(1)

No. 84-849-CFX
Status: GRANTED

Title: Kentucky, dba Bureau of State Police, Petitioner
v.
James E. Graham, et al.

Docketed:
November 26, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Geoghegan Jr., George M., Shanks, C.A. Dudley

Counsel for respondent: Lowery Jr., Jack M., Johnson, William E., Coleman, Redford H., Cusick Jr., Robert I., Ruck, Jack E., Reutlinger, Albert F., Shanks, C. A. Dudley, Lowery Jr., Jack M., Dickey Jr., Frank G., Bond, R. Keith

Entry	Date	Note	Proceedings and Orders
1	Nov 26 1984	G	Petition for writ of certiorari filed.
2	Dec 10 1984		Waiver of right of respondent Herbert Bennett, et al. to respond filed.
3	Dec 7 1984		Waiver of right of respondent John Robey, et al. to respond filed.
4	Dec 5 1984		Waiver of right of respondent Hardin County, KY to respond filed.
5	Dec 3 1984		Waiver of right of respondent Terry Hammond, et al. to respond filed.
6	Dec 1 1984		Waiver of right of respondent Charles D. Logsdon, et al. to respond filed.
7	Dec 6 1984		Waiver of right of respondent Clyde Wyatt to respond filed.
8	Dec 7 1984		Waiver of right of respondent City of Elizabethtown, et al. to respond filed.
9	Dec 12 1984		Brief of respondents Jack M. Lowery, Jr., et al. in opposition filed.
10	Dec 12 1984		DISTRIBUTED. January 11, 1985
11	Dec 14 1984		Waiver of right of respondent Kenneth E. Brandenburgh to respond filed.
12	Dec 12 1984		Waiver of right of respondent Robert Wilson, et al. to respond filed.
13	Jan 14 1985		Petition GRANTED. Justice Powell OUT.
			**********
14	Feb 12 1985		Record filed.
15	Feb 12 1985		Certified copy of joint appendix & C.A. proceedings received.
16	Feb 25 1985		Record filed.
17	Feb 25 1985		Certified original record, 1 box, received.
18	Feb 28 1985		Joint appendix filed.
19	Feb 28 1985		Brief of petitioner Kentucky, etc. filed.
20	Feb 28 1985	G	Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed.
21	Mar 18 1985		Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
22	Mar 15 1985		SET FOR ARGUMENT. Tuesday, April 16, 1985. (4th case).
23	Mar 22 1985		CIRCULATED.

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No. 84-849-CFX

Entry	Date	Note	Proceedings and Orders
24	Mar 30 1985	X	Brief of respondents James E. Graham, et al. filed.
25	Apr 16 1985		ARGUED.

No. 84-849

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE - - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(See inside cover for list of Attorneys)

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THE QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit misapplied the holding in *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978), when it ruled that the Commonwealth of Kentucky was liable for attorneys' fees under 42 USC § 1988 even though the Commonwealth had been dismissed as a party defendant and even though the relief granted the plaintiffs against the remaining party defendants was strictly retrospective in nature.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding before the United States District Court for the United States Court of Appeals for the Sixth Circuit.

James E. Graham, James D. Graham, Charles McClain, Fay Manion, Shelby Manion, and Rose Ella McClain were the plaintiffs before the United States District Court. The remaining parties were defendants before the trial court. The sole appellant in the Sixth Circuit was the Commonwealth of Kentucky, d/b/a Bureau of State Police.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE - - - Petitioner

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - Respondents

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Commonwealth of Kentucky, d/b/a Bureau of State Police, respectfully prays that a writ

of certiorari issue to review the Opinion and Order of United States Court of Appeals for the Sixth Circuit entered August 30, 1984.

OPINION BELOW

The *per curiam* Opinion and Order of the United States Court of Appeals for the Sixth Circuit in this case is an unpublished opinion. It is nevertheless listed among the unpublished opinions as *Graham* v. *Wilson,* 742 F. 2d 1455 (6th Cir. 1984). A copy of this opinion is set out in full in the Appendix, 1a-2a.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit was entered on August 30, 1984. This petition for writ of certiorari was filed with the Clerk of the United States Supreme Court within ninety (90) days of August 30, 1984.

28 USC § 1254(1) has conferred on this Court jurisdiction to review by writ of certiorari decisions of the United States Court of Appeals for the Sixth Circuit. This Court should grant the writ of certiorari under Rule 17.1(a) and (c) of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Eleventh Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USC § 1988.

STATEMENT OF THE CASE

On November 7, 1979, Kentucky State Trooper Eddie Harris was shot in cold blood at point blank range. Clyde Daniel Graham became the chief suspect when his step-mother's car was found in the vicinity with his driver's license and billfold being found in the bushes nearby. The Kentucky State Police assembled a group of troopers and searched the home of Clyde's father, James E. "Buddy" Graham. The six plaintiffs were arrested at this time. Minor physical injuries were caused to Buddy Graham. State Police Commissioner Kenneth Brandenburgh was not present nor did he participate in the initial decision to go to Graham's home. Commissioner Brandenburgh drove to the Elizabethtown vicinity; however, he did not participate in any actions.

The plaintiffs filed suit on September 16, 1980, against the Commonwealth of Kentucky, the named state police officers in their individual capacities, the Commissioner of the Kentucky State Police, Kenneth Brandenburgh in both his individual and official capacity, the City of Elizabethtown, the City of Hodgenville, and named officers of the City of Elizabethtown, the City of Hodgenville, and Hardin County. The plaintiffs only sought monetary damages. They have not sought injunctive or declaratory relief at any time.

The Commonwealth of Kentucky was dismissed as a party on November 26, 1980. See Appendix p. 15a. The Court's Order dismissed the Commonwealth of Kentucky based on the Eleventh Amendment to the

United States Constitution. The Court further stated in its order that:

> . . . The relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978), and *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that attorney's fees may be awarded against the state in an action by a private litigate only when the renef sought is prospective in nature . . .

The Commonwealth of Kentucky did not participate in any further portions of this case. The Attorney General of Kentucky filed a report after investigating the incident in question. The report concluded that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. See Appendix, pp. 27a & 28a. As a consequence of these officers' failure to observe state policy, the Commonwealth of Kentucky has not supported the individually named Kentucky State Police troopers nor Commissioner Brandenburgh in any manner. Each of these individuals has been represented by a private attorney who was paid by private funds throughout the case. The Commonwealth of Kentucky has not contributed or paid any of the troopers or the Commissioner's cost of litigation. The Commonwealth of Kentucky specifically did not contribute in any form or fashion to the monetary damages that the defendants agreed to pay. The Commonwealth of Kentucky was not notified of any negotiations to settle this case and did not participate in the negotiations.

The Commonwealth was not served with and did not see a copy of the *in camera* settlement until after both the appellant's and appellees' briefs were filed in the United States Court of Appeals for the Sixth Circuit. In other words the resulting July 1, 1982, settlement was fashioned without the Commonwealth of Kentucky being represented. This settlement details that the plaintiffs shall receive $45,000 in damages paid on an installment basis from Commissioner Brandenburgh personally and as agent for the Kentucky State Police Legal Fund, a voluntary association. The City of Elizabethtown had previously settled with the plaintiffs for $5,000.00. Hardin County settled with the plaintiffs for $10,000.00. The District Court did not assess any costs or attorney's fees against either the City of Elizabethtown or Hardin County.

On July 1, 1982, the District Court entered an order styled, Agreed Order Dismissing Settled. The settlement is as follows:

"By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.
4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.
5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kentucky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved." Appendix, pp. 16a & 17a.

No attorney for the Commonwealth signed the Agreed Order nor was advised of the Order until after the fact. The Commonwealth likewise had no knowledge of the language of underlying settlement until over sixteen months later.

On September 2, 1982, Judge Allen signed an *ex parte* order granting the plaintiffs attorney's fees from the Commonwealth of Kentucky. Appendix, p. 18a. The Commonwealth had no notice prior to the signing of this Order that attorney's fees were being sought. The Commonwealth filed a Motion to Vacate the Order granting attorney's fees and supporting Memoranda. The Court held a hearing on November 2, 1982, to decide if attorney's fees should be allowed, and if allowed, the amount of the fees. On November 15, 1982, the Court found that the Commonwealth was responsible for the plaintiff's costs in the amount of $64,878.82

including $58,521.71 in attorney's fees even though the Commonwealth and Commissioner Brandenburgh had been dismissed as a party, and even though the troopers were dismissed as parties. Appendix, pp. 12a, 13a. Perhaps it is even more important to note that the plaintiffs sought only retrospective damages. The plaintiffs did not ask for nor did they receive declaratory or injunctive relief at any time. In connection with the foregoing relief, the Court directed that no claim for attorney's fees shall be made by any of the plaintiffs against any individual defendants. Appendix, pp. 15a-17a. The court did not assess any costs in action against either Hardin County or the City of Elizabethtown.

The United States Court of Appeals for the Sixth Circuit upheld the lower court's decision.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Court of Appeals for the Sixth Circuit has in the case at bar rendered a decision which conflicts with those of other federal courts of appeals on the same matter. In its *per curiam* opinion, the Sixth Circuit decided an important question of federal law which has not been but should be settled by this court. Further, in reaching its conclusion, the Sixth Circuit decided a question in a manner which is inconsistent with the applicable decisions of this Court.

I. The Decision Is Contrary to That of Other Courts of Appeals

In the case at bar, the Court of Appeals for the Sixth Circuit affirmed the judgment of the United

States District Court for the Western District of Kentucky awarding plaintiffs in a 42 USC § 1983 suit $64,878.82 in costs including $58,521.71 in attorneys' fees against the Commonwealth. In its opinion the Sixth Circuit reasoned that it was proper under *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) to award under 42 USC § 1988 costs including attorneys' fees against the state in a civil rights action even though the state was dismissed as a party defendant, and even though the damages awarded against the remaining party defendants were strictly retrospective in nature. This decision requires the Commonwealth of Kentucky to pay costs in a civil rights action in which the relief was limited to damages despite the fact that the Commonwealth was a prevailing party as to the plantiffs.

This holding is at odds with the decisions reached by the United States Court of Appeals for the Third Circuit in *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981), and by the United States Court of Appeals for the Fifth Circuit in *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980) cert. den. 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981), and in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982).

In *Morrison, supra,* the Court of Appeals for the Third Circuit considered a case wherein Morrison sued the City of Pittsburgh and several of its police officers under 42 USC § 1983 for false arrest. In a non-jury trial the district court found for Morrison as to the police officers and awarded damages. The court found

for the City of Pittsburgh as to the claim of Morrison because the evidence failed to demonstrate that the individual acts of the police officers were an implementation of the city's policy. No prospective relief was awarded. The district court awarded Morrison an attorney's fee against the officers but not against the city. In affirming the denial of an attorney's fee against the City of Pittsburgh, the Court of Appeals said:

> "* * * Before Morrison can obtain costs he must, against the city, be a prevailing party. In a case such as this, in which he sought only money damages, and in which he failed to satisfy the court that his case satisfied the standards of *Monell* v. *Department of Social Services, supra,* he does not qualify as the prevailing party with respect to the only claim which was before the court . . . ." *Morrison, Id.,* p. 88.

In *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980), the United States Court of Appeals considered a civil rights action against a county, city, and law enforcement officers for unlawful arrest and for cruel and unusual punishment. The district court dismissed the county and city from the action but rendered a judgment on a jury verdict against two law enforcement officers. The court awarded attorneys' fees against the law enforcement officers but not against the county and city. No injunctive relief was fashioned. In reviewing the denial of attorneys' fees against the county and city, the Fifth Circuit said:

> "* * * Appellants have cited no authority for the proposition that attorneys' fees may be awarded against parties properly dismissed from the action merely because they were 'prevailing parties' with respect to other parties in the suit. Indeed, an award against Brazoria County and the City of Clute under the circumstances of this case would turn the meaning of 'prevailing party' on its head, since the district court expressly found, as a matter of law, that neither entity was liable to the appellants. The failure to award attorneys' fees against Brazoria County and the City of Clute was proper." *Dean, supra,* pp. 1337, 1338.

Two years later in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982), the Fifth Circuit reiterated its position. In *Berry, Id.,* the plaintiff filed a civil rights action against the Town of Maben, Mississippi and McLemore, a police officer employed by the town. The plaintiff sustained injuries during an arrest made by McLemore. Berry alleged that the town was liable vicariously and directly for the injuries. The trial court directed a verdict for the town and entered a judgment pursuant to a jury verdict for the plaintiff against the police officer in the amount of $10,000. The court assessed the police officer $5,000 in attorneys' fees. The court refused to award attorneys' fees against the town. No prospective relief was granted. In affirming the refusal of the trial court to assess attorneys' fees against the town the Fifth Circuit said:

> "* * * A plaintiff in a § 1983 suit may not be awarded attorneys' fees against a party properly dismissed from the action merely because the plaintiff prevailed against another party in the suit. This is so even where the party dismissed from

the suit is the governmental entity that employed the culpable defendant. *Dean* v. *Gladney*, 621 F. 2d 1331, 1337-38, (5th Cir. 1980), *cert. denied*, 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981)." *Berry, supra*, p. 34.

In *Morrison, supra; Dean, supra;* and *Berry, supra*, the respective Courts of Appeals held that where no prospective relief was awarded any defendant, and where the county or municipality was properly dismissed as a party defendant, no attorneys' fees could be assessed against the county or municipality. The decisions in these cases are contrary to that reached in the case at bar.

II. The Court Below Misapplied *Hutto, supra*.

Not only is the decision of the United States Court of Appeals for the Sixth Circuit in the instant case at odds with decisions on the same point from the Third and the Fifth Circuits, the decision determines an important question of federal law not settled by this Court based upon a misapplication and unwarranted extension of the opinion of this Court in *Hutto, supra*.

In *Edelman* v. *Jordan*, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), this Court made it clear that the Eleventh Amendment to the United States Constitution operates as a bar to retrospective relief against a state. This Court also made it quite clear that the Eleventh Amendment did not bar prospective relief against state officers and any ancillary fiscal consequences to state treasuries which are necessary in complying with the terms of the order granting prospective relief.

In *Hutto, supra*, this Court considered a civil rights action against officers of the Arkansas penal system. The district court found that the conditions in the Arkansas penal system constituted cruel and unusual punishment and fashioned injunctive relief to remedy the situation. The district court also found bad faith on the part of the defendants and awarded the plaintiff an attorney's fee to be paid out of the funds of the Arkansas Department of Corrections. The Court of Appeals affirmed and awarded the appellee an attorney's fee as a prevailing party under 42 USC § 1988. In approving of the award of the attorney's fees, this Court held that in adopting 42 USC § 1988 Congress intended to override the Eleventh Amendment and to authorize an attorney's fee award when an aggrieved party prevailed against state officials even in absence of a finding of bad faith.

The legislative history to 42 USC § 1988 makes it clear that the purpose of 42 USC § 1988 was to promote public policy by enforcing the civil rights laws. In other words 42 USC §1988 was adopted to promote the use of a "private attorney general" to preserve the rights of the people.

> "* * * There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot

> enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." Senate Report No. 94-1011, 94th Congress, Second Session, 1976, 5 U. S. Code Congressional and Administrative News 5908, p. 6.

It is apparent from the legislative history that what Congress had in mind when it adopted 42 USC § 1988 was enforcement. 42 USC § 1988 authorizes attorneys' fees when the courts grant prospective relief against state officers. 42 USC § 1988 was not intended to authorize attorneys' fees when damages alone are awarded.

Edelman, supra, held that the Eleventh Amendment is a bar to retrospective relief against a state but that it is not a bar to prospective relief against a state officer with an ancillary affect on the state treasury. *Hutto, supra,* held that attorney's fees are properly part of the ancillary affect on the state treasury when prospective relief is granted.

The situation in *Hutto, Id.,* was exactly that contemplated by Congress. The relief granted was prospective in nature. It was against state officers. This court approved of the award of attorneys' fees. The award had an impact on the Arkansas treasury ancillary to the injunctive relief granted.

On the other hand, the situation in the case at bar is vastly different from that in *Hutto.* In the instant case there was no prospective relief. The relief was strictly retrospective in nature. The Sixth Circuit held *Hutto, Id.,* to be applicable and awarded costs including attorney's fees directly against the Commonwealth of Kentucky. The Court awarded no costs against any of the other named defendants either in their individual or official capacities. The Sixth Circuit's decision is in total disregard of the Eleventh Amendment. The Sixth Circuit has decided an important question of federal law, which has not been decided by this Court but should be. Further, the Sxith Circuit has decided the question by misapplying and extending *Hutto, supra.*

The decision of the Sixth Circuit in the instant case is also contrary to the policy of this Court announced in *Hensley* v. *Eckerhart,* —— U. S. ——, 76 L. Ed. 2d 40, 103 S. Ct. —— (1983). In *Hensley, Id.,* p. 54, this Court said:

> "We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 USC § 1988 [42 USCS § 1988]. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."

The Eleventh Amendment to the United States Constitution is a bar to an action against a state. It, of course, has no application when a municipality is involved. However, in *Monell* v. *New York City Department of Social Services,* 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), this Court held that municipalities cannot be held liable solely on the basis of vicarious liability. In order to support a claim against a municipality for a violation of civil rights, a party

must demonstrate that the officers of the municipality were by their acts advancing a policy adapted by the town.

A state may not be named as a party defendant by virtue of the Eleventh Amendment. Nevertheless, it is proper when prospective relief is fashioned against state officers for the remedy to have an ancillary affect on the state treasury. But this surely does not mean when a state is involved rather than a municipality that the party seeking such an ancillary benefit as attorneys' fees should be held to a lesser standard of proof as to whether the officer is following state policy. Yet this is exactly what has occurred in the instant case. The Sixth Circuit has affirmed an award of attorneys fees against the Commonwealth of Kentucky. This award was made solely on the basis of *respondeat superior* and in violation of *Monell, supra,* since there was no proof that the Commonwealth of Kentucky had adopted a policy approving conduct such as was exhibited by the police officer in the search of the Graham house. In fact, the proof shows exactly the opposite. The appendix to the memorandum submitted by the Attorney General in support of his Motion to Vacate the Order Granting Attorney's Fees contains a portion of a Report of the Attorney General. Appendix, pp. 19a-25a. The report concludes that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Appendix, pp. 25a-28a. The officers violated state policy during the search. In addition, the Commonwealth refused to either provide counsel

for the police officers or to pay costs or any damages assessed against the officers.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit in the case at bar is at odds with those from the Third and Fifth Circuits as to awarding costs including attorneys' fees against a state when the state is a prevailing party as to the plaintiff, and when the relief awarded is strictly retrospective in nature.

The decision of the Sixth Circuit misapplied a decision of this Court when it held that *Hutto, supra,* authorized an attorneys' fees in the case at bar. In *Hutto, Id.,* the relief was prospective, the Attorney General had defended the corrections officers all along, and state of Arkansas never indicated that the officers were violating state policy, the litigation involved the state policy as to prison conditions which had been perpetuated for years. On the other hand, in the instant case, the relief was strictly retrospective, the Commonwealth was dismissed as a party defendant, the Commonwealth did not provide for the representation of the officers and never supported them, and finally the Report of the Attorney General indicates that the police officers violated state policy.

We submit that this Court should grant a writ of certiorari for the foregoing reasons to review the Opinion and Order entered herein by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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This is to certify that three copies of the foregoing Petition for Writ of Certiorari were sent, postage prepaid, to the following counsels of record on this 26th day of November, 1984.

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William E. Johnson
Johnson & Judy
326 West Main Street
Frankfort, Kentucky 40601

Frank G. Dickey, Jr.
Webb, Dickey, Sullivan & LeMaster
1701 Vine Center Office Tower
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Charles D. Greenwell

Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202

Reford H. Coleman
Collier, Arnett & Coleman
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Elizabethtown, Kentucky 42701

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2250 Citizens Plaza
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Jack M. Lowery, Jr.
Daniel B. Boone
Hollis Searcy
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Louisville, Kentucky 40202

Kim F. Quick
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Elizabethtown, Kentucky 42701

Carey Cravens Sacre

Counsel for Commonwealth of Kentucky

APPENDIX

NOT FOR PUBLICATION

No. 82-5778

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. GRAHAM; JAMES D. GRAHAM; CHARLES McCLAIN; FAY MANION; SHELBY MANION; ROSE ELLA McCLAIN, - - *Plaintiffs-Appellees,*

v.

ROBERT WILSON, et al., - - - - *Defendants,*

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE, - - - *Defendant-Appellant.*

On Appeal from the United States District Court
For the Western District of Kentucky

Filed August 30, 1984

BEFORE: ENGEL and MARTIN, Circuit Judges; and KRENZLER*, District Judge.

PER CURIAM. The Commonwealth of Kentucky appeals the award of attorney fees in this section 1983 action brought against members of the Kentucky state police organization.

We need not state the facts other than to acknowledge a settlement of the action during the trial. After the settlement, the district court awarded the plaintiffs $58,521.70 in attorney's fees against the Commonwealth pursuant to

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*Honorable Alvin I. Krenzler, United States District Judge for the Northern District of Ohio, sitting by designation.

42 U.S.C. § 1988. On appeal the Commonwealth argues that it was not liable in fees because it had been previously dismissed from the lawsuit. We disagree. It is well settled that a section 1988 attorney's fee award may run against a public treasury for section 1983 violations even when the state is not a party to the action. *Hutto* v. *Finney,* 437 U. S. 678, 699, 98 S. Ct. 2565, 2578 (1978).

Moreover, there is no record upon which the Commonwealth may rely to contest the amount awarded. This court does not discern any abuse of discretion by the district court in the award.

Accordingly, the judgment is affirmed.

Issued as mandate: September 21, 1984

Costs: None

A True Copy
Attest:
JOHN P. HEHMAN, Clerk
(s) By Audrey Corbett
Deputy Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This action is submitted to the Court for decision following evidence taken as to the claim of the plaintiffs for attorneys' fees to be paid by the Commonwealth of Kentucky, and following the submission of a motion by the Commonwealth requesting the Court to reconsider its previous order granting in principal attorney's fees against it.

On September 16, 1980, the plaintiffs filed this action against sixteen State Troopers, the Commissioner of the State Police, Kenneth Brandenburgh, four Hardin County Law Enforcement Officers, one Elizabethtown Officer, and against the Commonwealth of Kentucky, Hardin County and the City of Elizabethtown. Subsequently, the complaint was amended to add nine additional Kentucky State Police Officers. The complaint, as amended, sought damages for the six plaintiffs arising out of an alleged illegal search, false arrest, malicious prosecution, and the use of excessive force as to certain plaintiffs by the defendant, all in violation of 42 U.S.C. Sec. 1983. The pleadings also

allege conspiracy on the part of defendant Brandenburgh in allowing these allegedly illegal acts to take place.

In October, 1980, after the taking of the deposition of Brandenburgh, which was attended by two attorneys of the Department of Justice of Kentucky, an order was entered by this Court dismissing the action as to the Commonwealth. Subsequent to that order of dismissal, the case came on for trial on May 25, 1982, and after two days of negotiations between the parties, a settlement agreement was arrived at whereby plaintiffs would receive a total of $60,000, $45,000 of which would be paid by Brandenburgh and the State Police Defense Fund, $10,000 by Hardin County, and $5,000 by the City of Elizabethtown. The plaintiffs specifically preserved the right to prosecute against the Commonwealth their claim for attorneys' fees and costs, and they now assert a claim for $109,988.37, plus expenses of $6,842.12.

It should be observed that the claims of the plaintiffs arose out of events which occurred on the night of November 7th and during the early morning of November 8th, 1979. Briefly stated, it was developed by extensive discovery that following the cold-blooded shooting of Kentucky State Trooper Harris, with the chief suspect being Clyde Graham, the Kentucky State Police assembled a force of some 30 to 40 officers at Elizabethtown and made two warrantless searches of the home of James E. "Buddy" Graham and arrested the six plaintiffs. Also, it was developed that physical injuries were caused to James E. "Buddy" Graham. Commissioner Brandenburgh denied in his deposition having anything to do with the tactics used by the State Police, although he was in the vicinity of the Graham residence at the second search.

Subsequent to the events which took place November 7th and 8th, 1979, Clyde Graham was killed in Illinois by members of the Kentucky State Police and a great deal of publicity arose after the shooting. As a result of the pub-

licity, although Commissioner Brandenburgh had been conducting his own investigation into the Illinois shooting, it was decided on September 20, 1980 to have the Department of Justice of Kentucky conduct an independent investigation which was finally released on September 2, 1981. The independent investigation also recounted the events which occurred on the night of November 7th and 8th, 1979, relative to the search of the home of Buddy Graham and the arrest of the plaintiffs. The language in Title 42 U.S.C. Sec. 1988, Public Law 94-559 is very broad using the words "in any action" and therefore on its face does not seem to be limited to an action for damages under 42 U.S.C. Sec. 1983. In addition, it is significant to note that the statute specifically refers to the allowance of attorneys' fees to the prevailing party as part of the *costs*.

In *Hutto* v. *Finney*, 437 U. S. 678 (1978), the Supreme Court authorized the award of fees against the State of Arkansas in an injunctive proceeding in which the State was not a party. In so doing, the court referred specifically on p. 695 to the fact that it had never viewed the Eleventh Amendment as barring costs against the States even in suits between States and individual litigants. While *Hutto* did not involve a case in which damages were awarded to the plaintiff, cases such as *Rainey* v. *Jackson State College*, 551 F. 2d 672 (5th Cir. 1977) and *Sargeant* v. *Sharp*, 579 F. 2d 645 (1st Cir. 1978), make it clear that 42 U.S.C. Sec. 1888 does, indeed, authorize the imposition of fees as against a State or a municipal body where damages are awarded to the plaintiff.

The Commonwealth contends that it would be inequitable to allow attorneys' fees against the State when the State did not represent Brandenburgh through its Attorney General, and since the State took no part in the settlement proceedings and since the settlement proceedings stated on their face that Brandenburgh was without fault, although

he is obligated to pay the sum of $45,000 as the result of his actions which, along with those of other defendants, led to this lawsuit. None of these arguments are meritorious. *Maher* v. *Gagne,* 448 U. S. 122 (1980) holds that a plaintiff who has succeeded in obtaining some relief through a settlement is entitled to an attorney's fee just as he would have been if he had gone to trial and obtained a judgment. Here, there was a money settlement and plaintiffs' actions from the very beginning had been directed toward the obtaining of damages.

The fact that the Commonwealth had been dismissed as a party does not prevent the plaintiff from recovering attorneys' fees from the Commonwealth. As the Supreme Court stated in *Hutto* v. *Finney, supra,* and as the legislative history of 42 U.S.C. Sec. 1988 makes clear, a State or municipal body does not have to be a party to an action brought under 42 U.S.C. Sec. 1983 in order to be liable for attorneys' fees. Congress plainly contemplated that in many instances the recovery of attorneys' fees in a civil rights action should come from the State or municipal body rather than the individual official involved.

The significance of 42 U.S.C. Sec. 1988 is its insistence upon the proposition that where a State or municipal body has persons in authority who violated the civil rights of citizens, the State or municipal body should not be allowed to escape the payment of attorneys' fees where the plaintiffs whose rights have been violated have been the prevailing parties. See the Legislative Report attached to PL-1 and cited as "Appendix I and II" in the opinion of *Zarcone* v. *Perry,* 438 F. Supp. 788 (E.D. N.Y. 1977), at pp. 792-796.

In the case at bar, it was the action of the highest ranking police officer of the Commonwealth, coupled with the actions of many other police officers of the Commonwealth and with a few law enforcement officers of Hardin County and Elizabethtown which brought about the violations the

plaintiffs alleged in this lawsuit, and which resulted in the settlement described previously. The employment of private counsel by Brandenburgh and other State Police does not eradicate the fact that the actions of Brandenburgh and the other officers were taken in their official capacities. It is, therefore, only just that the State be compelled to bear the attorneys' fees which are designed to make the plaintiffs whole for the alleged violations of their civil rights.

We reach the conclusion in this unique case that plaintiffs are entitled to recover attorneys' fees from the Commonwealth for that portion of the work expended by their attorneys against the Kentucky State Police Officers and Kenneth Brandenburgh.

The fee schedule submitted by plaintiff's counsel requests that Daniel B. Boone and Jack M. Lowery be awarded fees at the rate of $135 per hour for 89½ hours expended by Mr. Boone and 485½ hours expended by Mr. Lowery. It also asks for fees at the rate of $85 per hour for Hollis L. Searcy, who allegedly expended 300¼ hours.

The testimony of William Miller, an experienced attorney of some 40 years practice in Louisville, was introduced and was to the effect that he believed that the rates requested by plaintiffs were reasonable. Mr. Oliver Barber was introduced as a witness for the Commonwealth and testified that he accepted a rate of $60 per hour from the Commonwealth for the services which he performed in the Eddyville litigation which resulted in a consent decree signed by the Honorable Edward H. Johnstone, District Judge. Mr. Barber freely admitted that his fees in the private area of practice could be as high as $125 per hour in his specialty of mental health and $80 to $100 per hour in areas in which he was not a specialist.

The Court is of the opinion that Messrs. Boone and Lowery, who are experienced attorneys, are entitled to receive fees at the rate of $90 per hour for work done other than trial-connected work. For trial connected work, by

which the Court means the work done on the day of trial and the day following it, which resulted in the settlement, they should receive a fee at the rate of $125 per hour. As for Mr. Searcy, his office work should be compensated at the rate of $70 per hour since he has only four to six years experience during the pendency of this litigation, and the trial connected work at the rate of $95 per hour.

In setting fees in a case of this sort, the leading case is that of *Northcross* v. *Board of Education of Memphis City Schools,* 611 F. 2d 624 (6th Cir. 1979). That case suggests that a duplication factor in a relatively small percentage of cases, generally speaking, is appropriate where the court finds that there has been some duplication in the efforts of counsel. In the case at bar, the Court finds the duplication factor to be 10% after examination of the occasions on which Mr. Lowery and Mr. Searcy conferred on the same subject, and on those occasions when they, plus Mr. Boone conferred together.

The question next arises as to whether or not plaintiffs' attorneys are entitled to a contingency factor such as was awarded in *Northcross, supra.* In *Northcross* at p. 638, the court points out that an attorney's regular hourly billing is based upon an expectation of payment win, lose or draw. It then points out that these regular rates will be adjusted upwards to compensate for the risk that the attorney is accepting of not being paid at all. The court then goes on to hold that where the facts are strong and the law is clear and where there is little risk of losing, the attorney's regular hourly rate will be adequate. In other cases where the facts are strongly disputed or where the law is uncertain, it will require a substantial upward adjustment of their hourly rates. We assume, therefore, that plaintiffs only seek to have the Court fix reasonable rates without making an upward adjustment for the contingency factor.

We observe also that since this is a multi-party action, a considerable portion of plaintiffs' attorneys' time was devoted to the preparation of their case against the County of Hardin and City of Elizabethtown. Without undertaking the laborious task of assuming every entry made by plaintiffs' counsel in their log of work time, the Court believes that it would be proper to determine that plaintiffs' counsel devoted 20% of their time to claims that did not involve Brandenburgh and the individual members of the Kentucky State Police. We note that there were 29 State Policemen involved as well as Brandenburgh, and only 4 Hardin County Law Enforcement Officers and one Elizabethtown Officer. We note also that the deposition of Brandenburgh was considerably longer than those of any other deponent, except those of the plaintiffs themselves. Also, we note that the settlement called for Hardin County and Elizabethtown to pay only one-fourth of the total amount involved.

Finally, we note that *Sargeant* v. *Sharp, supra,* is persuasive to the effect that in cases involving contingent fees the Court should be careful to insure that plaintiffs' counsel do not receive a windfall and do not receive their contingency fees from their clients, plus the award from the Court. The proper manner of handling the matter, *Sargeant* suggests, is for the Court to exercise its supervisory powers to fashion its order to insure that the award goes to compensate the client and not to overcompensate counsel. See 579 F. 2d at 648.

In the instant case, counsel has stated to the Court that they have a contingent fee arrangement with their clients which provides for a 50% payment. The fee award in the case at bar is $58,521.70,* that award being larger than the contingent fee which would be received by counsel. Ar-

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*See Appendix for mathematical computation of attorneys' fees.

rangements should be made between plaintiffs' counsel and their clients whereby plaintiffs are made whole and do not pay out any sums in attorneys' fees with the amount awarded by the Court to go to the attorneys. See *Sargeant, supra,* at p. 649 stating that the award should reimburse the plaintiff with the excess over the amount set by the fee arrangement going to her counsel. That statement was made in light of the fact that the principal attorney had already received a contingent portion of the approximately $89,000 recovery as a contingent fee.

In the case at bar, it is the understanding of the Court that plaintiffs' counsel to date have received as fees the sum of $15,000. As to the matter of costs, *Northcross, supra,* allows the prevailing party to recover reasonable out-of-pocket expenses incurred by its counsel which are usually charged to a fee-paying client in the course of providing legal services. Reasonable photo-copying, paralegal expenses and travel and telephone costs are, thus, recoverable pursuant to 42 U.S.C. Sec. 1988. See *Northcross,* at p. 639. Other costs which are normally provided for under 28 U.S.C. Sec. 1920 are on a different footing and ordinarily are taxed by the Court pursuant to the statute. See pp. 639-640.

In the instant case, the plaintiffs have lumped together the two types of costs, but in the interest of judicial economy, the Court will also consider them together and render one award for them. The Court has reviewed the itemization of expenses incurred and finds only one improper item which is, in fact, a duplication under the heading of "Dick Odle transcript September 25, 1980 $485." That item appears on both page 1 and page 2 of the itemization and should be stricken from the sum of $6,842.12 requested by counsel for plaintiffs. While the items of telephone expenses and mailing expenses are not set out in detail and there having been no objection made thereto, they are allowable, and the total amount of costs recoverable is $6,357.12.

A judgment in accordance with this opinion has been entered this day.

Dated: 11-15-82

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

APPENDIX

The fee award in this case has been arrived at in the following manner. The Court, in the case of all three attorneys, looked to the number of hours claimed by each attorney and multiplied them by 72%. The percentage figures took into consideration 20% of their time being devoted to non-State defendants, and the duplication factor of 10%, which was applied against the 80% remaining after the deduction for work done, against non-State defendants. The Court then multiplied the resulting number of office hours times $90 per hour in the case of Messrs. Boone and Lowery and $70 per hour in the case of Mr. Searcy.

With respect to court time for which Messrs. Lowery and Searcy claimed 20 hours and Mr. Boone claimed 4 hours, the Court reduced those hours by a factor of 10% and then multiplied the resulting figure by $125 per hour in the case of Messrs. Boone and Lowery and $95 per hour in the case of Mr. Searcy.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

JUDGMENT

Plaintiffs, having moved the Court for attorney's fees in the amount of $103,146.25 and expenses in the amount of $6,842.12, and the Court, being fully advised in the premises and having filed is memorandum opinion.

IT IS ORDERED AND ADJUDGED as follows:

The Commonwealth of Kentucky shall pay to Daniel B. Boone the sum of $6,003.10, to Jack M. Lowery the sum of $36,684.00 and to Hollis L. Searcy the sum of $15,834.60.

IT IS FURTHER ORDERED AND ADJUDGED that the Commonwealth of Kentucky shall pay to plaintiffs and their counsel jointly the sum of $6,357.12 as expenses.

IT IS FURTHER ORDERED AND ADJUDGED that counsel for plaintiffs shall refund to their clients any sums received by them as a contingent fee immediately after counsel receives payment of their fees from the Commonwealth of Kentucky.

This is a final and appealable judgment and there is no just cause for delay.

Dated 11-15-82

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

ORDER

Defendant, Commonwealth of Kentucky, having moved to dismiss this action on the grounds that the Eleventh Amendment to the Constitution of the United States bars it, and it appearing to the Court that the relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan*, 440 U. S. 332 (1979), *Hutto* v. *Finney*, 437 U. S. 678 (1978) and *Edelman* v. *Jordan*, 415 U. S. 651 (1974) that attorney's fees may be rewarded against a state in an action by a private litigant only when the relief sought is prospective in nature,

IT IS ORDEERD that the motion to dismiss be and it is hereby sustained.

This is not a final and appealable order.

Dated 11-26-80

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464-L (A)

JAMES E. GRAHAM; JAMES D. GRAHAM; CHARLES McCLAIN; FAYE MANION; SHELBY MANION and ROSE ELLA McCLAIN - - - - - *Plaintiffs*

v.

ROBERT WILSON, et al. - - - - - *Defendants*

AGREED ORDER DISMISSING AND AGREED ORDER DISMISSING SETTLED

* * * *

By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.

2. No fault having been found as to any claim against the Defendant, Kenneth Brandeburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.

4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.

5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kentucky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved.

(s) Charles M. Allen
Judge Charles M. Allen,
Chief Judge
Date: 7-1-82

Have Seen and Agreed To:

(s) Daniel Boone
Daniel Boone,
Attorney for Plaintiff

(s) Hollis Searcy,
Hollis Searcy
Attorney for Plaintiff

(s) Gary R. Hillerich
Gary R. Hillerich,
Attorney for defendants,
Bennett, Antle, Dalton, Tilford and Stiles

(s) William E. Johnson
William E. Johnson,
Attorney for Defendants,
Creekmore, Ross, Anderson, Edward,
Slack, Robey and McReynolds

(s) Frank H. Dickey
Frank Dickey
Attorney for Defendant,
Kenneth Brandenburgh

(s) William F. Woodward,
William F. Woodward
Attorney for Defendant,
Kenneth Brandenburgh

(s) Larry D. Raikes
Larry D. Raikes,
Attorney for Defendants,
Robert Wilson, Norris, Ronald Wilson,
Jones, Stewart, McQuown and Foster

(s) Rick Cusick
Rick Cusick
Attorney for Defendants,
Williams, Kipper and Hammond

(s) Charles D. Greenwell
Charles D. Greenwell,
Attorney for Defendant,
Clyde Wyatt

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L (A)

JAMES E. GRAHAM, et al., - - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - - *Defendants.*

ORDER—Entered September 2, 1982

On Motion of the Plaintiffs, by counsel, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that counsel for the Plaintiffs shall be awarded attorney's fees for their services in the above-styled action assessable against the Commonwealth of Kentucky and this cause is assigned to the 15th day of October, 1982, at 10:00 A.M. for hearing as to the amount of said attorney's fees.

(s) Charles M. Allen
Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464L(A)

JAMES E. GRAHAM, et al., - - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - - *Defendants.*

MEMORANDUM IN SUPPORT OF MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES

Comes the Commonwealth of Kentucky, by and through its Attorney General, and in support of the Motion to Vacate the Order Granting Plaintiff's Attorney's Fees states the following:

On November 26, 1980, this Court entered an order dismissing the Commonwealth from this law suit on the grounds that the Eleventh Amendment to the United States Constitution barred the law suit and because the relief sought by the plaintiffs was retrospective in nature rather than prospective. Also in that order this Court correctly found that attorneys' fees may be awarded against the state in an action by a private litigant only where the relief sought is prospective in nature. *Hutto* v. *Finney,* 437 U. S. 678, 572 L. Ed. 2d 522, 98 S. Ct. 2565 (1978); *Edelman* v. *Jordon,* 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Quern* v. *Jordan,* 44 U. S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979).

After having been dismissed from the suit and not having participated in the suit or any settlement negotiations, the Commonwealth was served with a copy of this Court's July 1, 1982, order dismissing the suit as settled and also awarding plaintiffs' attorneys' fees against the Commonwealth. Needless to say, the Commonwealth is severely prejudiced by being brought into this suit at such a late date. It cannot be overemphasized that after the Commonwealth was dismissed, it did not participate in this case either directly or indirectly by supporting any defendants through payment of damages, legal representation, or fees.

The Commonwealth of Kentucky has acted in good faith throughout this matter and has never condoned the actions of the Kentucky State Police. In fact, a report issued by the Kentucky Attorney General's Office in September, 1981, was of the opinion that, based upon the evidence reviewed, that the officers involved acted in an unprofessional manner and used excessive force on the plaintiffs. (See Commonwealth's appendix to this memorandum consisting of excerpts from the report of the Attorney General regarding his conclusions on the search of the Graham residence). The Commonwealth has steadfastly refused to provide counsel to the defendants and to pay for the defendant's attorney's fees, cost or any damage award assessed against them.

Because the Commonwealth is not now a party, and has not been a party defendant in the last two years, this Court has no authority to assess attorneys' fees against the Commonwealth in its own name. The parties in this case entered in an *in camera* settlement regarding the payment of damages, responsibility for payment of attorneys' fees and other unknowns. The Commonwealth was not privy to these settlement negotiations and has, to this date, not seen the settlement agreement. Incredibly, the plaintiffs assert that the Commonwealth is bound to pay the attorneys' fees

by virtue of the terms of the settlement agreement to which the Commonwealth was not even a party. One begins to wonder if something is amiss if one can be bound *in absentia* to a settlement to which it is not a party. Very simply, the plaintiffs and defendants cannot bind the Commonwealth to a settlement to which it was not a party.

Further, the Commonwealth submits that because Kenneth Brandenburgh, former Commissioner of State Police was dismissed from the suit in this Court's order of July 1, 1982, he is not now before this Court. Because all claims have been dismissed against Brandenburgh in his individual and official capacity, and because he is no longer a party, the plaintiffs have no cause of action against him in any form. Nor can the plaintiffs reach the Commonwealth through Brandenburgh because he is not before the Court.

Another factor militating against the award of attorneys' fees in this case is that the plaintiffs are not prevailing parties within the meaning of 428 U.S.C. 1988. This case was settled by all parties who were not dismissed outright by the Court. Because no admissions concerning proof of fault exist by virtue of the terms of the court's order itself, the plaintiffs have not demonstrated that they prevailed on any issues.

The plaintiffs rely heavily on *Hutto* v. *Finney, supra,* in support for the claim of attorneys' fees against the Commonwealth. The Commonwealth will demonstrate that this reliance is clearly misplaced. The fact situation in *Hutto, supra,* involved an award of attorneys' fees upon the granting of *injunctive relief,* which was prospective in nature. Further, the Court in *Hutto* noted that since the state officials, who were found to have acted in *bad faith,* were sued in their official capacities and since the officials were represented throughout the proceedings by the Arkansas Attorney General, the award of attorneys' fees was properly paid with state funds. *Hutto* at 536. The facts in the case at bar differ completely from *Hutto.*

The relief sought in the case *sub judice* was for damages and not injunctive in nature. The Commonwealth of Kentucky has acted in good faith throughout this matter. The Commonwealth never condoned the actions of the officers in the case at bar, and therefore steadfastly refused to provide them with legal representation. The Commonwealth also has refused to pay for any of the defendant's attorneys' fees, costs or damages assessed against them. Although the officers in the case at bar were probably sued in their *individual and official capacities,* the damage settlement was, in essence, a settlement by them individually. Support for this position is garnered from the fact that the damage award, and the defendant's attorneys 'fees and costs were paid with *private* funds. This, coupled with the fact that the Commonwealth did not represent the defendants, is consistent with the position that these named defendants acted outside the scope of their official duties. As such, it is not appropriate to grant attorneys' fees against the Commonwealth.

It must be remembered that the grant of attorneys' fees is not mandatory in civil rights cases, it is purely discretionary. Civil Rights Attorneys' Fees Awards Act of 1976 (amending 42 U.S.C. 1988). In the case of *Zarcone* v. *Perry,* 438 F. Supp. 788 (D.C. N.Y., 1977), affd. 581 F. 2d 1039 (2nd Cir.), the court held that the plaintiff was not entitled to an award of attorneys' fees under 42 U.S.C.A. 1988 (as amended), since the plaintiff's cause of action was basically a tort action and only in a general sense did the plaintiff's successful litigation vindicate the public's right to due process. The Court explained further that an award of fees under 42 U.S.C.A. 1988 is not mandatory, and that because discretionary authority was preserved in the amendment, this indicated a congressional intent that some prevailing parties should not be awarded attorney's fees. More importantly, the court stated that

prevailing parties are not routinely granted attorney's fees simply because they are awarded damages. It is only when plaintiffs advance the public interest that an award of attorney's fees is proper. This Court, in the case *sub judice,* is essentially dealing with a tort action for assault. As such, under the reasoning of *Zarcone, supra,* an award of attorney's fees is not proper.

Another factor in this case which makes the Commonwealth responsible for the payment of the attorneys' fees improper, is the fact that the damage award was paid by the defendants with private funds. The Commonwealth submits that this is prima facie evidence that the defendants acted outside the scope of their official capacity. In such a situation the defendant's are personally liable for the damage award given the plaintiffs. *Bishop* v. *Tice,* 622 F. 2d 349 (8th Cir. 1980). It naturally follows then, that if the officials acted outside the scope of their official capacity, and are thus liable for the payment of a damage award, then they should be personally liable for the award of attorney's fees in such a situation. *Universal Amusement Co., Inc.* v. *Hofbeing,* 616 F. 2d 202 (5th Cir. 1980).

Lastly, the Commonwealth submits that the amount of the settlement itself should be considered along with the basis of the action when awarding attorney's fees. *Zarcone, supra.* The case of *Buxton* v. *Patel,* 595 F. 2d 1182 (9th Cir. 1979), stands for the proposition that where adequate compensation could be given plaintiffs' attorneys from the damage award, the purposes of 42 U.S.C.A. 1988 are not served. The Court listed several factors to be considered: 1) if the action is the result of a *single violation,* 2) amount of damages recovered, and 3) whether the alleged violation of rights was indicative of a broad violation of rights affecting the public. See also: *Zarcone, supra.* Obviously, the Commonwealth is at a distinct disadvantage in arguing that the damage award should be used in paying for the

attorneys' fees. The Commonwealth does not know the amount of the damage award because it has not been made privy to the terms of the settlement agreement which was negotiated between the parties without the participation and approval of the Commonwealth. However, when the factors outlined in *Buxton, supra,* and *Zarcone, supra,* are applied to the facts of this case, an award of attorneys' fees against the state, or any other defendant for that matter, is improper.

Based on the above, the Commonwealth requests this Court to vacate its order granting the plaintiffs' attorneys' fees payable by the state.

Respectfully submitted,

Steven L. Beshear
Attorney General

(s) Paul E. Reilender, Jr.
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Counsel for Defendants

NOTICE

Please take notice that the foregoing Memorandum In Support of Motion to Vacate the Order Granting Attorney's Fees will be mailed, first class postage prepaid, to the Clerk of the United States District Court for the Western District of Kentucky at Louisville, this the 26th day of October, 1982, to be considered at the convenience of the Court.

Paul E. Reilender, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support of Motion to Vacate the Order Granting Attorney's Fees was mailed, first class postage prepaid, to Hon. Daniel Boone and Hon. Jack Lowery, 231 South Fifth Street, Louisville, KY 40202, counsel for plaintiffs, Hon. Cathy Cravens Snell, Justice Cabinet, Office of General Counsel, State Office Building, Franfort, KY 40601; Hon. Hobson L. James, 12 The Mall, Elizabethtown, KY 42701; Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, KY 40202; Hon. William E. Johnson, Johnson, Judy & Gaines, Box 756, Frankfort, KY 40602; Hon. Charles Landrum, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Short & Mill Streets, Lexington, KY 40507 and Woodward, Hobson & Fulton, 2510 First National Tower, Louisville, KY 40202; Hon. Larry D. Raikes, P.O. Box 88, 206 W. Water, Hodgenville, KY 42748; Hon. Charles D. Greenwell, Middleton & Reutlinger, 501 S. Second Street, Louisville, KY 40202; Hon. C. Michael Weldon, Collier, Arnett & Coleman, 128 W. Dixie Avenue, Elizabethtown, KY 42701; Hon. Bert T. Combs, Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202; Hon. Reford H. Coleman, Collier, Arnett & Coleman, 128 West Dixie Avenue, P.O. Box 847, Elizabethtown, KY 42701; Hon. Jack E. Ruck, Wallace, Gordinier, Wilson Ruck & Cooper, 2250 Citizens Plaza, Louisville, KY 40202; Hon. Carl Howell, Jr., One Financial Center, Hodgenville, KY 42728; Hon. Wade Richardson, Richardson, Richardson & Miller, Brandenburg, KY 40108; and Hon. Richard G. Segal, 1517 Kentucky Home Life Building, Louisville, KY 40202, counsel for defendants, this the 26th day of October, 1982.

Paul E. Reilender, Jr.
Assistant Attorney General

APPENDIX

CONCLUSIONS

After reviewing all of the information obtained during the investigation into the murder of Kentucky State Police Trooper Eddie Harris and the subsequent shooting death of Clyde Daniel Graham by Kentucky State Police Sgt. Eugene Coffey in Effingham, Illinois, the Office of the Attorney General concludes the following:

1. *The Death of Kentucky State Police Trooper Eddie Harris*

   All of the available evidence overwhelmingly indicates that Clyde Daniel Graham shot and killed Kentucky State Police Trooper Eddie Harris without provocation.

2. *The November 7-8, 1979 Search of the Graham Residence by Law Enforcement Authorities*

   a. The requisite leadership by the Elizabethtown Kentucky State Police command staff, from the post commander down, was lacking on the night of November 7, 1979. This lack of leadership resulted in confusion by state police personnel as to assignments and in the convergence of an excessive number of troopers at the Graham residence to participate in a search which rapidly became uncontrolled.

   b. The evidence indicates that certain Kentucky State Police personnel used execssive force against James D. "Jimmy" Graham during the search of the Graham residence on the night of November 7, 1979.

      It is noted that conflicting testimony concerning the use of excessive force in the arrest of James E. "Buddy" Graham, Charles McLain and James D.

Graham on the night of November 7, 1979, at the Graham residence has been considered by two juries, one in the United States District Court in Louisville, Kentucky, during the trial of James E. "Buddy" Graham on charges of harboring a fugitive, etc. and one in the trial of these three individuals in Hardin District Court on the charges of disorderly conduct and resisting arrest. The jury in the federal case acquitted James E. "Buddy" Graham on all charges, while the jury in the state case convicted James E. "Buddy" Graham and Charles McLain of disorderly conduct and resisting arrest, while acquitting James D. Graham of all charges. It is further noted that the law allows a defendant, when said defendant believes that such force is necessary to protect himself, to use physical force if the arresting officer is using more force than is reasonably necessary to effect the arrest. (See KRS 503.050(1); KRS 503.-060(1) and Commentary).

Therefore, while there is some question raised as to whether excessive force was used in the arrest of James E. "Buddy" Graham and Charles McLain, there seemed to be no question in the mind of either jury concerning the use of excessive force in the arrest of James D. "Jimmy" Graham. No one interviewed admitted striking any of these individuals, other than the one blow struck by Trooper Harold Antle to Charles McLain, and no one interviewed identified anyone as striking any other blows.

c. The above actions by both the post command staff and certain individual state troopers demonstrated an obvious lack of professionalism on their part and a complete breakdown of the discipline demanded of such highly trained law enforcement officials. While the existence at that time of a highly charged, emo-

tional atmosphere among members of the Kentucky State Police is certainly understandable because of the gruesome murder of their comrade, Trooper Eddie Harris, and their knowledge of the past criminal activities of some of the individuals involved, this cannot justify the unprofessional actions referred to above. Therefore, this report is being forwarded to the Secretary of the Kentucky Department of Justice and the Commissioner of the Kentucky State Police for whatever action they deem appropriate to insure that such actions will not recur.

3. *The Death of Clyde Daniel Graham in Effingham, Illinois*

   a. While questions can be raised concerning the appropriateness of the plan to effect the

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - Respondents

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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15 pp

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES MCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA MCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RECEIPT OF PETITION

The Petition for Writ of Ceriorari was received by the Respondents on November 27, 1984.

OBJECTION TO JURISDICTION

The Court's rule 21.1 (b) provides that the Writ of Certiorari shall contain . . . "a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties."

The Petitioner has designated individuals and governmental units as Respondents, which are not parties

to this action and has totally failed to designate the true parties in interest, namely, Jack M. Lowery, Jr., Daniel B. Boone and Hollis L. Searcy as Respondents.

Rule 20.03 provides

> "The Clerk will refuse to receive any Petition for Writ of Certiorari which is jurisdictionally out of time."

The Opinion of the Sixth Circuit Court of Appeals affirming the award of attorney's fees to the Respondents, Jack M. Lowery, Jr., Daniel B. Boone and Hollis L. Searcy, was filed on August 30, 1984, and more than 90 days have elapsed since its entry. 28 U.S.C.S. § 2101 (c).

It is submitted that the Petition for Writ of Certiorari herein is defective, fails to comply with the Rules of this Court and should therefore be dismissed.

COUNTERSTATEMENT OF THE CASE

During the Oral Argument before the Court of Appeals, Judge Engel, in open Court, expressed the disappointment of the Court in the lack of candor exhibited by counsel for the Commonwealth. Unfortunately, this same lack of candor is repeated in the Petitioner's Statement of the Case to this Court and requires this brief Counterstatement.

In describing the constitutional violations inflicted upon the Respondents, James E. Graham, James D. Graham, Charles McLain, Shelby Manion, Faye Manion and Rose Ella McLain, the Petitioner states, "minor physical injuries were caused to James E. Graham." This is not a fair recital of the facts.

All three male Respondents, James E. Graham, James D. Graham and Charles McLain, were ordered out of the house at gun point and forced to lie face down in the yard. All were cursed and repeatedly struck with fists, flashlights and weapons. James E. Graham was beaten so severely that one of the officers finally shouted, "Get the old man out of here, it looks like he's dead." Charles McLain was repeatedly struck in the head and genitals even after he was handcuffed. All three male Respondents required hospitalization and James D. Graham was in the hospital for several days.

The female Respondents, Faye Manion, Shelby Manion and Rose Ella McLain, were also forced to lie face down in the yard. They were also threatened, cursed and abused. They were kept prisoners by the police mob for over five hours. One woman was forced to use the bathroom within sight of the state troopers.

The state troopers made a warrantless search of the Graham residence at approximately 9:00 p.m., during which they forced their way into the residence, threatened and struck James D. Graham. Shortly before midnight, they made a second warrantless search of the Graham residence, actually physically taking over the premises. The three male Respondents, James E. Graham, James D. Graham and Charles McLain, were beaten so severely that they were literally covered in blood, their facial features almost unrecognizable.

The Petitioner states that State Police Commissioner, Kenneth Brandenburgh, was not present and did not participate in these actions. This statement is

totally untrue. In Brandenburgh's deposition, presently on file in the Federal District Court, Brandenburgh admitted that he was present at the assembly point of the 40 or more officers as the second warrantless search was actually planned. He conceded that he personally went to the Graham residence, arriving there before the three male Respondents, James E. Graham, James D. Graham and Charles McLain, were removed from the scene. He admitted seeing these Respondents but denied anything unusual about their appearance. The unbelievable nature of this testimony is undisputably established by photographs showing these Respondents to be literally covered with blood. Even Brandenburgh concedes that he became aware that the three male Respondents required hospitalization that evening.

Despite the foregoing, Commissioner Brandenburgh at no time ever initiated disciplinary action against his subordinates. Instead, he publically published the so called Brandenburgh reports in which he sought to conceal and cover up the misconduct of the Kentucky State Police. For more than a year, he was able to conceal his participation and presence at the scene of the beatings.

It is interesting to observe that the Petitioner claims on the one hand that Brandenburgh was not present and did not participate in these actions and yet on the other hand, concedes that Brandenburgh was guilty of misconduct to the extent that the Commonwealth of Kentucky was unwilling to even furnish counsel in his behalf in this litigation.

The Petitioner refers to the Agreed Order of Settlement, which contains the language disclaiming fault as to any of the Defendants. The Petitioner completely neglects to advise the Court, however, that a second judgment clearly delineating the fault and liability of Commissioner Brandenburgh was filed at the same time and held in camera by the Court.

The most glaring misstatement of all is the assertion that the Order granting attorney's fees was entered ex parte by the District Court. On July 14, 1982, the Respondents filed a motion for an award of attorney's fees, together with a supporting memorandum and with notice to counsel for the Commonwealth. This motion can be identified as number 170 on the District Court's Civil Docket Sheet.

On August 11, 1982, counsel for the Commonwealth filed their response to this motion. This response may be identified as number 171 on the District Court's Civil Docket Sheet.

The matter was then taken under submission and on September 9, 1982, the Order was entered awarding attorney's fees and passing the case until November 2, 1982, for a hearing as to the amount of the fee. Thereafter, the Commonwealth was granted leave to file motions to vacate the attorney's fee award and these motions were considered by the Court. The Court did not enter its Order fixing attorney's fees until after both sides were afforded a full hearing, including the right to call witnesses and to cross-examine the Respondent attorneys. All of the foregoing is reflected in the Civil Docket Sheet of the District Court.

ARGUMENT

I. THIS DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS OR OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioner argues that certiorari should be granted because the holding by the Sixth Circuit in the case at bar is in conflict with the decisions of other circuits, specifically, *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981); *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980) cert. den., 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981), and *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1981).

To be short about the matter, and simply stated, the Petitioner is in error when it asserts that there is a conflict between the case at bar and the cited opinions.

In each of the cited cases, the Plaintiffs sought to hold a governmental entity liable for the acts of subordinate employees on the basis of respondeat superior. In none of the three cases, were the Plaintiffs successful in establishing that the acts of the subordinates constituted an implementation of governmental policy. Not surprisingly, when the governmental agencies were dismissed as a matter of law, the Courts held that the Plaintiffs were not prevailing parties as to such governmental entities.

There is no conflict in the Sixth Circuit concerning these principles. *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978), cert. den., 440 U. S. 914, 99 S. Ct. 1230, 59 L. Ed. 2d 464 (1979), is almost identical to the cases relied on by the Petitioner.

In the case at bar, the Plaintiffs did not proceed upon any theory of respondeat superior. Commissioner Brandenburgh was sued individually and in his official capacity as the highest ranking official in the entire Kentucky State Police Bureau. As Commissioner Brandenburgh conceded in his deposition, (also on file in the District Court) his principle function was to make policy decisions for the Kentucky State Police. He was not a simple deputy sheriff or small town police chief. He was the Commissioner of the Kentucky State Police vested by the legislature of Kentucky (KRS 16.060) with broad policy making authority, including the prevention of crime and the maintenance of law and order throughout the Commonwealth.

Faced with these facts, the Sixth Circuit followed the clear holding of this Court in *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). The clear teaching of *Hutto* is that when a policy making official of a state government is successfully sued in his official capacity, the state becomes liable for attorney's fees as part of the costs whether or not the state is a party to the litigation.

The Petitioner has failed to demonstrate any conflict between the federal circuits and has failed to suggest any "important question of federal law which has not been, but should be settled."

II. THE APPLICATION OF THE ATTORNEY'S FEE ACT IS NOT RESTRICTED TO CASES INVOLVING PROSPECTIVE OR INJUNCTIVE RELIEF.

The Petitioner argues that attorney's fees may be assessed under §1988 only in cases involving prospective relief. It is completely clear that this is a misstatement of the law. The Act itself provides that it applies "in any civil action." As this Court observed in *Hutto, supra,*

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil right laws."

Undoubtedly, the vast majority of cases that fall within the purview of §1988 do involve prospective relief. We would like to believe that only rarely would a Commissioner of a state's police force be personally involved in illegal searches, police brutality, and active concealment of the misconduct of his subordinates.

Federal law is well settled, however, that the awarding of attorney's fees is not restricted to cases involving prospective relief.

In *Scheuer* v. *Rhodes,* 416 U. S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), a case arising out of the alleged wrongful death of certain students in the Kent State University tragedy, Mr. Chief Justice Burger observed in an unanimous opinion by the Court,

> *"In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."* (emphasis supplied)

The plain fact of the matter is in the vast majority of police brutality cases, injunctive relief would be totally inappropriate. As was observed in *Milwe* v. *Cavuoto,* 653 F. 2d 80 (2nd Cir. 1981), a police brutality case,

> "Moreover, an individual damage action to redress instances of police misconduct is often the only tool reasonably available to vindicate society's interest in insuring that those who enforce the law also abide by it. (See authorities cited). Certainly, the vindication of an individual's civil rights, in an action against a state trooper, inures to the benefit of all citizens."

As another example of the broad application of §1988, in *Raney* v. *Jackson State College,* 551 F. 2d 672 (5th Cir. 1977), the Plaintiff obtained neither injunctive relief nor money damages. The Plaintiffs' recovery was limited to a simple declaratory judgment that he had been denied his First Amendment right of free speech by the officers and members of the board of trustees of the Institutions of Higher Learning of Mississippi. Nonetheless, the Court approved the award of attorney's fees to the Plaintiffs' attorney.

The foregoing authorities by no means exhaust the decisions authorizing the award of attorney's fees in cases in which the Plaintiff secures only money damages. We submit, however, that the foregoing are sufficient to establish that the award of injunctive relief is not a condition precedent to the award of attorney's fees under §1988.

III. THE QUESTION OF ATTORNEY'S FEES WAS PROPERLY DEFERRED UNTIL AFTER THE DECISION ON THE MERITS.

The Petitioner complains that since the Commonwealth was not consulted and did not participate in the settlement negotiations between the Respondents and Commissioner Brandenburgh, it is unfair that at a later stage in the proceedings, it was assessed attorney's fees.

The simple answer to this argument is that the Commonwealth had no standing to participate in this case on the merits, because of the immunity afforded it by the Eleventh Amendment and the Doctrine of Sovereign Immunity, which shielded it from any award of damages. Before *Hutto, supra,* and as early as *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 70 (1927), this Court recognized that the award of attorney's fees was an "assessment of costs" rather than an award of damages.

This Court has also recognized that the question of attorney's fees is uniquely separable from the decision on the merits and cannot even be considered until one party has prevailed.

There is no need to paraphrase. Mr. Justice Powell wrote very clearly for an unanimous Court in *White* v. *New Hampshire Department of Employment Security,* 455 U. S. 445, 71 L. Ed. 325, 102 S. Ct. 1162 (1982),

> "Regardless of when attorney's fees are requested, *the Court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed' . . .*

> unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. *Their award is uniquely separable from the cause of action to be proved at trial."* See *Hutto* v. *Finney,* 437 U. S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978). (emphasis supplied)

At the conclusion of the inquiry on the merits, the District Court conducted a separate hearing on the matter of attorney's fees at which hearing the Commonwealth of Kentucky was afforded the right to be fully heard.

CONCLUSION

For the foregoing reasons and authorities, the Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

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Counsel for Respondents

CERTIFICATE AND PROOF OF SERVICE AND OF MAILING FOR FILING

I hereby certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served upon Mr. David L. Armstrong, Attorney General, Mr. George M. Geoghegan, Jr., Assistant Deputy Attorney General, Capitol Building, Frankfort, Kentucky 40601-3494, and Ms. Cathy Cravens Snell, General Counsel, Justice Cabinet, State Office Building, Frankfort, Kentucky 40601, Counsel for Petitioner, by depositing them in a United States mail-box facility with first class postage prepaid, on this 10th day of December, 1984. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of the Court, on the same date and by the same method.

Jack M. Lowery

JACK M. LOWERY, JR.

Counsel for the Respondents

Office - Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-849 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID MORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1984
CERTIORARI GRANTED JANUARY 14, 1985

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
OF LOUISVILLE

No. C-80-0464-L (A)

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ROSE ELLA MCCLAIN
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v.

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Elizabethtown, Kentucky

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c/o Elizabethtown Police Department
Elizabethtown, Kentucky

CITY OF ELIZABETHTOWN, KENTUCKY
SERVE: James Pritchard, Mayor
111 W. Dixie Ave.,
Elizabethtown, Kentucky

HARDIN COUNTY, KENTUCKY
SERVE: R. R. Thomas, County Judge
Elizabethtown, Kentucky

KENNETH BRANDENBURG, Individually and as Commissioner of the Bureau of State Police
Frankfort, Kentucky

COMMONWEALTH OF KENTUCKY
doing business as the Bureau of State Police
SERVE: Governor, John Y. Brown
Frankfort, Kentucky, and

UNKNOWN DEFENDANTS - - - - *Defendants*

COMPLAINT

Come the Plaintiffs, by counsel, and for their cause of action state as follows:

1. The Plaintiffs are citizens of Hardin County, Kentucky.

2. At all times referred to herein, the Defendants, Kentucky State Police Officers, were employed by the Kentucky Bureau of State Police, were acting under color of state law and are specifically identified in part as follows: Robert Wilson, David Norris, Herbert Bennett, Ronald Wilson, Wayne Creekmore, Harold Antle, Ellis Ross, Clyde Wyatt, Glenn P. Dalton, James B. Jones, Michael Anderson, Trooper Tilford, Bruce W. Slack, Holmes T. Stiles, Samuel Stewart and Joseph W. Edwards.

3. At all times referred to herein, the Defendant, Kenneth Brandenburg, was the Commissioner of the Bureau

of the Kentucky State Police, and, as Commissioner was charged with the legal duty of maintaining law and order within the boundaries of the Commonwealth of Kentucky and with supervising and maintaining the discipline and conduct of all subordinate members of the Bureau of State Police in general and of the named defendant members of the Kentucky Bureau of State Police in particular.

4. The Commonwealth of Kentucky, d/b/a Bureau of State Police is a named Defendant herein and liable to the Plaintiffs in that:

A. The wrongful acts and omissions committed by the Defendant Officers of the Bureau of State Police constituted the execution or implementation of a policy or custom of the Commonwealth of Kentucky.

B. The wrongful acts and omissions committed by the Defendant Officers of the Bureau of State Police were or have been authorized, sanctioned or ratified by state government officials functioning at a policy making level.

C. State government officials functioning at a policy making level were deliberately indifferent to the wrongful acts and omissions against the Plaintiffs by the defendant officers of the Kentucky Bureau of State Police.

D. Pursuant to the provisions of 42 U.S.C. Sec. 1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney fees incurred in this action.

5. At all times referred to herein, the Defendants, Dewey Skaggs, Charles David Logsdon and Overlin Payne, were Deputy Sheriffs of Hardin County, Kentucky, and acting under the color of state law.

6. At all times referred to herein, the Defendant, David Owsley, was duly elected as the Sheriff of Hardin County, Kentucky, and liable for the wrongful acts and

omissions of his Deputy Sheriffs set out herein, pursuant to the provisions of KRS 70.040.

7. The Defendant, Hardin County, Kentucky, is a named Defendant herein and is liable to the Plaintiffs in that:

A. The wrongful acts and omissions committed by the Defendants, Sheriff and Deputy Sheriffs of Hardin County, Kentucky, constituted the execution or implementation of a policy or custom of Hardin County, Kentucky.

B. The wrongful acts and omissions committed by the Defendant, Sheriff and Deputy Sheriffs, were or have been authorized, sanctioned or ratified by Hardin County Officials functioning at a policy making level.

C. Hardin County Officials functioning at a policy making level were deliberately indifferent to the wrongful acts and omissions against the Plaintiffs by the Defendant Sheriff and Deputy Sheriffs of Hardin County, Kentucky.

D. Pursuant to the provisions of 42 U.S.C. Sec. 1988, the Defendant, Hardin County, Kentucky, is liable for the payment of reasonable attorney fees incurred in this action.

8. At all times referred to herein, the Defendant, Tommy Masterson, was employed as a police officer for the City of Elizabethtown, Kentucky, and at all times referred to herein was acting within the scope of his said employment and under color of state law.

9. At all times referred to herein, the acts and omissions committed by the Defendant, Tommy Masterson, were in the course of his employment as a police officer for the City of Elizabethtown, Kentucky, and upon this account, the City of Elizabethtown is liable to the Plaintiffs.

10. The Defendant named herein as unknown defendants are unidentified and unknown officers of the Bureau of State Police of the Commonwealth of Kentucky, peace

officers of unknown counties or cities, and unknown counties or cities, acting under color of state law who permitted or participated in the wrongful acts and omissions set forth herein.

11. The names and addresses of said unknown defendants are unknown to the Plaintiffs but are within the knowledge of the Defendant, Kenneth Brandenburg, Commissioner of the Bureau of State Police and of John A. Smith, duly elected Sheriff of Larue County, Kentucky.

12. The amount in controversy in this action exceeds $10,000.00 exclusive of interest and cost herein.

13. This action arises under 42 U.S.C. Sections 1983, 1985, 1986 and 1988, and the Constitution of the United States of America, including the provisions of the 4th, 5th, 6th, 11th and 14th Amendments thereto.

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sec. 1331 and 1343.

15. On or about November 7, 1979, in Hardin County, Kentucky, the Defendants wrongfully, maliciously and in wanton disregard of the rights of the Plaintiffs, James E. Graham, James D. Graham and Charles McClain, invaded the privacy of, falsely arrested and imprisoned, assaulted and beat, terrorized and threatened, and illegally searched the persons and premises of the Plaintiffs.

16. On or about November 7, 1979, in Hardin County, Kentucky, the Defendants wrongfully, maliciously, and in wanton disregard of the rights of the Plaintiffs, Fay Manion, Shelby Manion and Rose Ella McClain, invaded the privacy of, falsely arrested and imprisoned, assaulted and abused, terrorized and threatened, and illegally searched the persons of the Plaintiffs.

17. On or about November 8, 1979, the Defendants abused the legal process of Hardin County, Kentucky, in that they maliciously and with a wrongful motive caused

to be placed against the Plaintiffs, James E. Graham, James D. Graham, and Charles McClain, criminal charges, without probable cause.

18. As a direct and proximate result of the beatings, deprivation of liberty, and the other constitutional violations inflicted upon the Plaintiffs, James E. Graham, James D. Graham and Charles McClain, by the Defendants, these said Plaintiffs were severely and painfully injured and caused to suffer great mental distress and apprehension, were caused to incur medical, hospitalization and legal expenses, all to the damage of each Plaintiff in the amount of $50,000.00.

19. As a direct and proximate result of the deprivation of liberty, the physical abuse, and the other constitutional violations inflicted upon them by the Defendants, these Plaintiffs, Fay Manion, Shelby Manion and Rose Ella McClain, have suffered great fear and mental anguish together with physical and mental pain and suffering, all to the damage of each Plaintiff in the amount of $25,000.00.

20. At all times referred to herein, the Defendants conspired for the purpose of depriving the Plaintiffs of their equal protection of the laws or of their equal privileges and immunities under the law in violation of their rights under the Constitution of the United States, and upon this account, they are liable for all of the malicious acts and omissions referred to herein pursuant to 42 U.S.C. Sec. 1985.

21. At all times referred to herein, the Defendant, Kenneth Brandenburg, Commissioner of the Bureau of State Police, had knowledge of the wrongs conspired to be done as set out previously herein and further had the power to prevent or aid in preventing the commission of same but wrongfully neglected or refused to do so, and on this account, is liable to the Plaintiffs pursuant to the provisions of 42 U.S.C. Sec. 1986.

22. At all times referred to herein, those defendants who were present when the wrongs previously referred to were committed against the Plaintiffs, or those Defendants who had knowledge of the conspiracy to commit said wrongs but neglected or refused to exercise their power and authority as peace officers to prevent or aid in preventing the commission of said wrongs, are liable to the Plaintiffs pursuant to the provisions of 42 U.S.C.S. (sic) Sec. 1986.

23. The wrongful acts and omissions of all of the defendants as set out herein were in malicious and wanton violation of the rights, privileges and immunities secured to the Plaintiffs by the Federal Civil Rights Act and by the Constitution of the United States of America, and upon this account, said defendants are liable to the Plaintiffs and each of them in the amount of $150,000.00 as punitive or exemplary damages.

WHEREFORE, the Plaintiff, James E. Graham, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, James D. Graham, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, Charles McClain, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $50,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For his costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which he may in anyway appear entitled.

WHEREFORE, the Plaintiff, Fay Manion, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

WHEREFORE, the Plaintiff, Shelby Manion, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

WHEREFORE, the Plaintiff, Rose Ella McClain, demands judgment herein as follows:

1. For judgment against the Defendants both jointly and severally in the amount of $25,000.00 compensatory damages and $150,000.00 punitive damages.

2. For a trial by jury herein.

3. For her costs herein expended, including the award of reasonable attorney fees.

4. For all other just and proper relief in which she may in anyway appear entitled.

Boone & Lowery

(s) By: Jack Lowery, Jr.
231 South Fifth Street
Louisville, Kentucky 40202
502-589-6060

DOCUMENT No. 168, ENFORCEABLE SETTLEMENT AGREEMENT TO BE HELD IN CAMERA, IS BEING SENT IN A SEALED ENVELOPE TO THE UNITED STATES SUPREME COURT CLERK.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

MOTION

Come the Plaintiffs, by counsel, and move the Court to enter the following Order. In support hereof there is attached hereto the Plaintiffs' Memorandum of Authorities.

(s) Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

ORDER

On Motion of the Plaintiffs, by counsel, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that counsel for the Plaintiffs shall be awarded attorney's fees for their services in the above-styled action assessable against the Commonwealth of Kentucky and this cause is assigned to the _____ day of _____, 1982, at ____M. for hearing as to the amount of said attorney's fees.

_____
Judge

_____
Date

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L (A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF THE MOTION FOR AN AWARD OF ATTORNEY'S FEE PURSUANT TO THE PROVISIONS OF 42 U.S.C. SEC. 1988

May it please the Court:

The Civil Rights Attorney's Fee Award Act of 1976 provides, in pertinent part, as follows:

> "In *any* action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title . . . or title IV of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis supplied)

It requires no argument to show that the above language is broad and contains no expression of limitation or restriction.

This obviously is not original with the writer. The Supreme Court of the United States in *Hutto* v. *Finney,* 437 U. S. 678 (1978) made the following observation:

> "As this Court made clear in Fitzpatrick v. Bitzer, 427 U. S. 445, Congress has plenary power to set aside the

> States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws."

It is clear that the Congress of the United States in enacting the Civil Rights Attorney's Fee Award Act of 1976 sought to encourage plaintiffs to vindicate and enforce their constitutional rights. So much is this the case that it is fair to conclude that a presumption exists that successful plaintiffs will be awarded attorney's fees, the only possible exception arising from such special circumstances as would render such an award unjust. *Equal Employment Opportunity Commission* v. *Bailey Co.,* 563 F. 2d 439 (6th Cir. 1977).

What are the special circumstances in the case at bar? These plaintiffs successfully initiated an action to enforce their federally protected rights under the provisions of 42 U.S.C., §1983. A substantial portion of their recovery was obtained as a result of the actions of Kenneth Brandenburgh, committed by him in his official capacity as the highest ranking member of the Kentucky State Police.[1] These plaintiffs also obtained an out of court settlement on their 1983 claim from the City of Elizabethtown and from Hardin County, Kentucky. It is thus clear beyond any possibility of dispute that these plaintiffs were prevailing parties. Their status as prevailing parties is not in any way affected by the fact that they prevailed through settle-

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[1]Actually the judgment was obtained against two Deputy Sheriffs of Hardin County, Kentucky.

ment rather than by jury verdict. *Maher* v. *Gagne,* 448 U. S. 122 (1980).

Since the plaintiffs have fully complied with the requirements of §1988, the only remaining issue is: whether or not this Court is authorized to assess these attorney's fees against the Commonwealth of Kentucky, an entity which this Court earlier held was not a proper party defendant. Both the legislative history of the enactment of the Attorney's Fee Act and the consistent holdings of the federal judiciary provide the affirmative answer to this question.

In *Miller* v. *Carson,* 563 F. 2d 741 at p. 755 (1977), the Fifth Circuit Court of Appeals quoted the following language from the Report of the Senate Committee on the Judiciary on the Civil Rights Attorney's Fee Award Act as follows:

> "In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency, or under his control, or from the State or local government (*whether or not the agency or government is a named party*)."

The Court thus concluded,

> "Congress meant to allow the awards against governmental units even when the units are not named parties."

There are many similar holdings *Morrow* v. *Dillard,* 580 F. 2d 1284 at p. 1299 (1979); *Familias Unidas* v. *Briscoe,* 619 F. 2d 391 (1980).

It is equally clear that the enactment by the Congress of §1988 was a constitutional exercise of its powers under the Fourteenth Amendment, which effectively removed any Eleventh Amendment immunity in favor of the individual states insofar as the award of attorney's fees is concerned.

See *Maher* v. *Gagne, supra; Seals* v. *Quarterly County Court,* 562 F. 2d 390 (6th Cir. 1977).

The foregoing authority brings us to the only remaining issue in this case. This issue may be simply stated: are attorney's fees "retroactive damages" and may they properly be awarded only in cases in which prospective relief is obtained?

As to the retroactive damage issue, it is completely well settled that attorney's fees are not "damages."

We submit to the Court that the holding of *Hutto* v. *Finney, supra,* clearly establishes that the award of attorney's fees is simply an assessment of "costs," which have historically been awarded against state governments without regard to any Eleventh Amendment immunity. As early as the case of *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70 (1927), the Supreme Court recognized that insofar as the assessment of costs is concerned, a federal court may treat a state just as any other litigant. Congress was careful in enacting §1988 to provide that attorney's fees could be imposed not as damages but as "part of the costs." We believe the judicial and congressional treatment of attorney's fees as being distinctly different from the award of damages is so obvious as to require no further argument.

It finally becomes necessary to consider whether or not Congress intended the provisions of 1988 to apply to a broad range of cases in which constitutional rights were successfully vindicated or whether the Congressional intent was to restrict the award of attorney's fees to those cases in which prospective relief was obtained.

We would first point out to the Court that the language of the Act itself provides that attorney's fees will be awarded in *any* action to enforce the provisions of §1983. Moreover, a diligent search has failed to reveal *any* holding that an award of attorney's fees against a state is restricted

to cases involving prospective relief. The only cases that have been suggested as raising this implication are *Edelman* v. *Jordan,* 94 S. Ct. 1347; *Hutto* v. *Finney, supra,* and *Quern* v. *Jordan,* 440 U. S. 332.

Edelman, supra and *Quern, supra,* merely held that a plaintiff could not recover retroactive money damages against a state. The question of attorney's fees was not involved in these cases top side or bottom.

In footnote 24 at p. 695 the Supreme Court in *Hutto, supra,* made the following statement:

> "While the decisions allowing the award of costs against States antedate the line drawn between retroactive and prospective relief in Edelman v. Jordan, 415 U. S. 651, such awards do not seriously strain that distinction. Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief. (An award of costs will almost invariably be incidental to an award of prospective relief, for costs are generally awarded only to prevailing parties, see Fed. Rule Civ. Proc. 54(d), and only prospective relief can be successfully pursued by an individual in a suit against a State.)

Let us briefly analyze this footnote. The Supreme Court obviously recognizes that the award of costs (attorney's fees) does not constitute an award of retroactive damages. Second, when the Court observes that the award of fees merely reimburses the plaintiff for a portion of the expenses incurred in seeking prospective relief, the Court is simply recognizing that in the quoted authority, *Edelman, supra,* the plaintiff there was in fact seeking prospective relief.

The final statement "only prospective relief can be successfully pursued by an individual in a suit against the state" is, of course, undeniably true. The only factual circumstance in which an individual would ever be constitutionally privileged to actually name a state as a party defendant would be a case in which injunctive relief was the appropriate remedy. Clearly, an individual cannot sue a state for retroactive damages.

Conceding the full implication of the above dicta in *Hutto, supra,* it by no means follows that the plaintiffs are precluded from suing a policy making state official for either damages or prospective relief. In the case of the high ranking official (as compared to the state itself), 1988 makes no distinction as to the appropriateness of an attorney's fee award whether the relief sought is retroactive or prospective. The golden thread is the successful vindication by the plaintiff of his constitutionally or federally protected rights.

Perhaps, we can illustrate the total implausibility of any other construction.

Let us suppose in Example A that the Commissioner of Corrections implements a policy whereby prison housing is grossly overcrowded. Suppose further that the Commissioner restricted the diets of the prisoners to sub-human levels and that brutality was rampant throughout the entire system. Would the state who employed this Commissioner of Corrections be a proper party defendant? The answer is clearly no. Would prospective relief be granted against the Commissioner, the effect of which would be the same as if the state had been made a party defendant? The answer is clearly in the affirmative. This is the teaching of *Hutto, supra.* In *Hutto, supra,* upon similar facts, an attorney's fee award assessed against the state was specifically approved.

Example B. The same Commissioner of Corrections personally goes to a cell, housing two of the same plaintiffs and callously stands by while subordinate prison officers brutally beat these plaintiffs. The two inmates then file suit under 42 U.S.C. §1983 charging the Commissioner with deliberate indifference to their rights. Would the state be a proper defendant in this example? The answer, of course, is no. Could, however, the plaintiffs institute their civil rights action against the Commissioner in his official capacity for the violation of their federally protected rights and seek damages? The answer is in the affirmative. We further ask: is there any logical reason why these same plaintiffs who could recover attorney's fees against the state upon the successful enforcement of their civil rights in Example A should not also receive such an award in Example B? We submit that the clear and necessary intent of Congress as reflected both in the language of the Act itself as well as the Report of the Senate Committee on the Judiciary (See *Miller* v. *Carson, supra*), precludes such an irrational and unjust distinction.

First of all, it must be recognized that only in rare instances have we witnessed a factual situation in which a high ranking state official becomes so personally involved in the direct constitutional violation of another that he becomes answerable in damages. In the vast majority of cases, the involvement of the high ranking state official is usually restricted to implementing an unconstitutional policy of a continuing nature and in such an instance, prospective relief is the means adopted by the Plaintiff to vindicate his constitutional rights. It by no means follows, however, that there is a total absence of decisions wherein successful plaintiffs were granted attorney's fees against a state where damages and damages alone were recovered.

In *Rheuark* v. *Shaw,* 447 F. Supp. 897 (1979), the plaintiffs obtained damages against a state judge and his court

reporter, because of a 23 month delay in the preparation of the transcript of the trial in which they were earlier convicted of various criminal offenses. This delay, alleged the plaintiffs, violated their constitutional rights to a speedy appeal and to due process of law. *These plaintiffs were awarded specific money damages, but were denied all injunctive relief.* In approving the award of attorney's fees against Dallas County (in this context, the county stands on the same legal basis as a state) the Court held,

> "By enacting 42 U.S.C. §1988 "Congress intended to override the Eleventh Amendment immunity of the states and authorized fee awards payable by the states when their officials were sued in their official capacity."

It is thus obvious that the holding in *Rheuark, supra,* establishes that the obtaining of prospective relief is not a condition precedent to an award of attorney's fees under 1988.

In *Raney* v. *Jackson State College,* 551 F. 2d 672 (1977), the Fifth Circuit Court of Appeals was faced with three separate appeals arising out of the violation of Raney's First Amendment right to free speech by members of the Mississippi State Board of Trustees of Institutions of Higher Learning. Raney, under contract to teach at Jackson State College for the academic year, 1970-71, testified as an expert defense witness on behalf of persons charged with criminal obscenity in the exhibition of a motion picture. When Raney's activities became known, the Trustees elected to terminate his employment. A 1983 action was filed in the District Court and dismissed for lack of subject matter jurisdiction. On appeal, the Fifth Circuit granted an injunction to prevent Raney's dismissal until such time as his damage case could be heard. The college did not totally comply with this order, and it became necessary for Raney to reapply to the Fifth Circuit obtaining the further

order that pending trial, Raney be reinstated to the type of teaching contemplated in his contract and not merely research.

The case eventually came to trial, and the jury returned verdicts against Raney and in favor of the Board of Trustees. On appeal, the Fifth Circuit held that Raney was entitled to a judgment notwithstanding the jury verdict on the limited grounds that Raney had been wrongfully denied his First Amendment right of free speech for the academic year 1970-71.

All other issues were decided in favor of the defendants. *No prospective relief whatsoever was obtained. The injunctions entered were not for the purpose of securing prospective relief, but were for the purpose of maintaining the status quo until the matter could be brought on for trial.* The defendant's cross-appeal alleging that the Eleventh Amendment barred any award of attorney's fees against the state was denied. In spite of the fact that the only vindication obtained by Raney was the "declaratory judgment that he was not terminated at Jackson State for any reason other than his previous exercise of his First Amendment right to free speech", an unanimous Court approved the award of attorney's fees under §1988.

Once again, Raney makes it very clear that the award of prospective relief is not a condition precedent to an award of attorney's fees against a state.

In all fairness and candor, however, can there ever be an award of damages against a high ranking state official for constitutional violations committed by him without an accompanying and inherent prospective benefit to the plaintiffs individually and to the public generally? We have always assumed that as a basic corner stone of tort law, and here we are dealing with constitutional torts, was the recognition that the vindication of individual rights in a given case, through damages, would offer prospective re-

lief to unnamed members of the public, who might be spared these same abuses because of the example rendered in the earlier case.

It is our deep conviction that the recovery of damages in a case such as this one will offer as much, if not more, prospective relief than would be afforded by any injunction which the Court could enter. By the same token, we are convinced that a holding which stifles the broad purpose of Congress to encourage the vindication of constitutional rights by awarding attorney's fees against a state would have an adverse prospective effect.

For all of the foregoing reasons, we submit that the Court should authorize an award of attorney's fees pursuant to the provision of 42 U.S.C. §1988 against the Commonwealth of Kentucky and that this matter should be assigned for a hearing so that the Court may approve the amount of the fees to be awarded.

Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

CERTIFICATE

I hereby certify that a copy of the Plaintiff's Memorandum of Authorities in Support of the Motion for an Award of Attorney's Fee was mailed to Mr. Steven L. Beshear, Attorney General, State Capitol, Frankfort, Kentucky 40601 this 13th day of July, 1982.

(s) Jack M. Lowery
Jack M. Lowery
Counsel for Plaintiffs
231 South Fifth Street
Louisville, Kentucky 40202
589-6060

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES

Comes now the Commonwealth of Kentucky and responds to plaintiffs' request for attorneys fees against the Commonwealth of Kentucky as follows:

1. On November 26, 1980, this Court specifically dismissed the Commonwealth of Kentucky as a defendant in this action and ruled that attorneys fees are only proper where prospective relief is sought or granted.

2. Since then the Commonwealth of Kentucky has not been, and is not now, a party to this action and the Court has no jurisdiction to assess attorneys fees against the Commonwealth.

3. Although the Agreed Order dismissing the above styled action as settled does not prevent any party from making a claim against the Commonwealth of Kentucky for legal fees and court costs, the Commonwealth of Kentucky was not a party to this settlement and did not agree in any way to pay any attorneys fees in this action.

4. The Agreed Order dismissing and settling this case did not seek nor encompass any injunctive or perspective relief on behalf of the plaintiffs against the Commonwealth

of Kentucky, and therefore, any fees or claims against the Commonwealth of Kentucky are barred by the Eleventh Amendment to the United States Constitution. [See *Quern* v. *Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)].

Respectfully submitted,

(s) Paul F. Isaacs
Paul F. Isaacs
General Counsel
Department of Justice
State Office Building
Frankfort, Kentucky 40601
Telephone (502) 564-7554
Counsel for Commonwealth of Kentucky

NOTICE

Please take notice that the foregoing Response to Plaintiffs' Motion for Attorneys Fees will be mailed, postage prepaid, to the Clerk of the Court on this 10th day of August, 1982, to be considered at the convenience of the Court.

(s) Paul F. Isaacs
Paul F. Isaacs
Counsel for Commonwealth of Kentucky

(CERTIFICATE OF SERVICE
OMITTED IN PRINTING).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464-L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES OR IN THE ALTERNATIVE MOTION TO HOLD THE HEARING GRANTING ATTORNEY'S FEES IN ABEYANCE

Comes the Commonwealth of Kentucky, by and through counsel, and moves this Court to vacate its order of September 9, 1982, which awarded attorney's fees to the plaintiffs for their action against the Commonwealth on the following grounds:

(1) The September 9, 1982, Order directly conflicts with the November 26, 1980, Order which dismissed the Commonwealth from the law suit on the grounds that the Eleventh Amendment to the United States Constitution barred the law suit and the relief sought by the plaintiffs because it was retrospective rather than prospective. Also in that Order this Court specifically found that "attorney's fees may be awarded against the state in an action by a private litigant only when the release sought is prospective in nature." See *Hutto* v. *Finney,* 437 U.S. 678 (1978); *Edelman* v. *Gordon,* 415 U.S. 651 (1974). See the attached Order, Commonwealth Exhibit No. 1.

(2) The Commonwealth, which has been dismissed from this suit, is prejudiced by being brought at this late

date after it has been dismissed and has not participated in this case either directly as a party or indirectly by supporting any other party through payment of any fees or damages, the ratification of any officers' actions, or any other type of direct or indirect support or participation. The Court in *Hutto, supra,* explicitly found that the Arkansas Corrections officials were operating in bad faith; that the State of Arkansas provided for the officers' attorney through the use of the Attorney General and that the District Court gave repeated warnings to remedy the violations. The facts before this Court differ completely. The Commonwealth of Kentucky has acted in good faith throughout this matter. It has not condoned the actions of the State Police, but replaced the Commissioner. The Commonwealth has steadfastly refused to pay for any of the defendant's attorneys' fees, costs or damages. In addition to failing to meet the prospective relief criteria of *Hutto,* the plaintiffs have not shown any bad faith or any participation on the part of the Commonwealth.

(3) Because the Commonwealth of Kentucky has not been, and is not now a party, the Court has no authority to assess fees against the Commonwealth in its own name. Because Kenneth Brandenburgh, former Commissioner of the State Police, was dismissed from this suit in the Agreed Order Dismissing and Agreed Order Dismissing Settled signed by all parties and approved by the Court on July 1, 1982, he is not before this Court either. Paragraph two of this settlement dismissed *"any claim against the Defendant, Kenneth Brandenburgh."* The agreement extinguishes all claims against Mr. Brandenburgh in his official capacity as well as his individual capacity. Therefore, even if the Commonwealth could be held responsible for these fees under *Hutto,* the plaintiffs have agreed to extinguish all claims against Mr. Brandenburgh. Because all claims have been dismissed against Mr. Brandenburgh and he is

no longer a party, the plaintiffs have no cause of action against him in any form nor can the plaintiffs reach the Commonwealth through Brandenburgh because he is not before the Court.

(4) The plaintiffs are not a prevailing party within the meaning of 42 U.S.C. § 1988. This case was settled by all parties who were not dismissed outright by the Court. The language of the Agreed Settlement, which is below, clearly states that fault was not found to exist.

By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

Even though the plaintiffs may recover attorney's fees for a settlement under certain circumstances, they should not recover in the instant case. Because no admissions of proof or fault exist, the plaintiffs have not demonstrated that they prevailed on any issues. Rather the parties entered into an in camera settlement to which the Commonwealth is not privy and has not seen. The plaintiffs and other defendants can not bind the Commonwealth to a settlement to which it is not a party.

Based on all the above grounds, the Commonwealth asks this Court to vacate its Order granting attorney's fees.

In the alternative that this Court chooses not to vacate its Order, the Commonwealth moves that this hearing for

attorney's fees be held in abeyance on the grounds that no documentation of any type concerning the attorney's fees has been provided to the Commonwealth. This information is necessary so that the Commonwealth may adequately defend the case through competent cross-examination and enable it to present proof to rebut the plaintiffs' presentation. Therefore, the Commonwealth requests that this case be held in abeyance until such time that this Court determines whether to grant the Commonwealth's Motion to Vacate its Order of September 9, 1982, and if the Court makes a determination that such a hearing should be held that the plaintiffs be ordered to provide all documentations concerning attorney's fees to the Commonwealth prior to the hearing and that a hearing be set in a reasonable length of time after the plaintiffs have supplied all of the requested information.

Wherefore, the Commonwealth prays for an appropriate Order granting its Motion to Vacate or in the alternative its Motion to Hold this Hearing in Abeyance.

Respectfully submitted,

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING).

EXHIBIT

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action No. C-80-0464 L(A)

JAMES E. GRAHAM, ET AL. - - - - *Plaintiffs*

v.

ROBERT WILSON, ET AL. - - - - *Defendants*

ORDER

Defendant, Commonwealth of Kentucky, having moved to dismiss this action on the grounds that the Eleventh Amendment to the Constitution of the United States bars it, and it appearing to the Court that the relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978) and *Edelman* v. *Jordan,* 415 U. S. 651 (1974) that attorney's fees may be awarded against a state in an action by a private litigant only when the relief sought is prospective in nature.

IT IS ORDERED that the motion to dismiss be and it is hereby sustained.

This is not a final and appealable order.

Dated 11-26-80

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

C 80-0464 L(A)

JAMES E. GRAHAM, Et Al.

v.

ROBERT WILSON, Et Al.

ORDER

The above-styled action came on for hearing on October 15, 1982, on the question of the amount of attorneys fees to be awarded to counsel for plaintiff. It appearing that the Commonwealth has now filed a Motion to Vacate and counsel for the plaintiffs having filed this day Affidavits and supporting documents relative to amounts, time spent, etc.,

IT IS ORDERED that this matter be continued to November 2, 1982, for said hearing on fees.

IT IS FURTHER ORDERED that counsel for the State shall have 10 days hereafter in which to file an additional memorandum in support of its motion to vacate to which the plaintiffs indicated they would probably not file any further response.

IT IS FURTHER ORDERED that the Commonwealth shall have 10 days hereafter in which to file specific objections regarding the affidavits and attachments filed this day by counsel for plaintiff.

October 18, 1982

(s) Charles M. Allen
Charles M. Allen, Chief Judge
United States District Court

Copies to:
Counsel

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0464-L(A)

JAMES E. GRAHAM, Et Al. - - - - *Plaintiffs*

v.

ROBERT WILSON, Et Al. - - - - *Defendants*

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES

STATEMENT OF FACTS

This entire case arises out of alleged actions of assault and battery committed by individual members of the defendant class against the plaintiffs, and the alleged acquiescence by individuals in the State Police. No allegations were proven and the plaintiffs settled this case on the basis of no fault having been found." (See Agreed Order Dismissing and Agreed Order Dismissing Settled of July 1, 1982). The plaintiffs sought an award for monetary damages only. They did not seek injunctive relief at any stage of this suit.

Three primary orders should be reviewed when considering the denial of attorney's fees; the November 26, 1980 Order which dimissed the Commonwealth as a party, the July 1, 1982 Agreed Order Dismissing and Agreed Order Dismissing Settled, and the September 9, 1982 Order which granted attorney's fees.

On November 26, 1980, this Court entered an Order dismissing the Commonwealth of Kentucky based on the Eleventh Amendment. The Court further found:

> . . . The relief sought by the Plaintiffs is restrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979); *Hutton* v. *Finney,* 437 U. S. 678 (1978) and *Edelman* v. *Jordan,* 415 U.S. 651 (1974) that attorney's fees may be awarded against the state in an action by a private litigant only when the relief sought is prospective in nature. . . .

On July 1, 1982, this Court entered an Agreed Order Dismissing and Agreed Order Dismissing Settled in this suit. The Commonwealth did not participate in the settlement in any manner. Furthermore, the Commonwealth did not agreed to pay nor has it paid any damages, attorney's fees, or costs. The Kentucky State Police Legal Fund is a private voluntary organization which appears to have participated in the settlement in some manner. Counsel for the Commonwealth still has not been served or even seen a copy of the signed settlement which this Court is holding in camera. This settlement cannot bind the Commonwealth because is was not a party. Plaintiffs' counsel, Daniel Boone and Hollis Searcy, signed and agreed to the settlement. Paragraph two of the aforementioned Agreed Order states: "No fault having been found as to any claim against the defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost."

On September 9, 1982, this Court entered an Order without holding a hearing, that counsel for the plaintiffs be awarded attorney's fees against the Commonwealth of Kentucky, without any finding of facts that indicated any change since November 26, 1980 in the nature of the liti-

gation or that any prospective relief was sought or granted in this action.

I. THE PLAINTIFFS SOUGHT RETROSPECTIVE RELIEF, SIMILAR TO TORT DAMAGES, AND ARE PROHIBITED FROM RECEIVING ATTORNEY'S FEES UNDER *HUTTO*.

The Agreed Order of Dismissal which settled this case did not seek injunctive relief or any form of prospective relief on behalf of the plaintiffs against the Commonwealth. The plaintiffs only sought monetary damages. It is well settled that retrospective fees or claims against a state are barred by the Eleventh Amendment to the United States Constitution. See *Quern* v. *Jordan,* 440 U. S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Edelman* v. *Jordan,* 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Hutto* v. *Finney,* 437 U. S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978).

The plaintiffs' case is primarily a tort action for assault and battery clothed in the language of 42 U.S.C. § 1983. As a tort action, the plaintiffs seek to vindicate only themselves and to protect the public's right to due process in the most indirect general manner.

> "Prevailing plaintiffs in civil rights actions are not routinely granted attorneys' fees simply because they are awarded damages. (Citations omitted). Rather, it is only when the plaintiffs advance the public's interest by bringing the action that an award of attorneys' fees is proper." *Zacone* v. *Perry,* 438 F. Supp. 788, 791, (E.D. N.Y. 1977).

Section 1988 was created to compensate attorneys who acted as "private attorneys general" to see that the broad constitutional rights were defended in the courts. The instant case does not safeguard any fundamental constitutional principles. Rather it is a narrow suit against select individuals akin to a common law tort action. Attorneys fees should not be awarded for these tort type actions which only seek restrospective damages. See *Martin* v. *Hancock,* 466 F. Supp. 454 (Minn. 1979); *Zacone* v. *Perry, supra.* No attorneys' fees should be awarded in this case because (1) they are retrospective fees which is clearly prohibited by the Eleventh Amendment and (2) the fees are not justified because they benefit only the individuals filing the suit. The Court should uphold its first order which it issued on November 26, 1980, and rule that the Commonwealth is not responsible for any attorneys' fees or costs whatsoever.

II. FACTUALLY, THIS CASE IS TOTALLY DIFFERENT FROM *HUTTO* AND THE PLAINTIFFS SHOULD NOT BE GRANTED ATTORNEY'S FEES UNDER THIS CRITERIA.

Hutto v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) first arose in 1969 over complaints that conditions in the Arkansas prison system violated the Eighth and Fourteenth Amendments to the United States Constitution. The United States Court for the Eastern District of Arkansas originally entered an order directing the Arkansas Department of Corrections to improve prison conditions. Subsequent hearings were held to determine if conditions were, in fact, improving. In 1973, the same District Court held that the continuing supervision by the court was no longer needed, but cautioned that sanctions as well as attorney's fees would be imposed if further violations occurred. The Eighth Circuit Court of Appeals reversed the lower court requiring that District Court hold additional hearings. The District Court held such hearings . . . and found that prison conditions had not been cured but had deteriorated and made express finding that the director of the Arkansas Department of Corrections had acted in bad faith. The plaintiffs in *Hutto* sought

injunctive relief requiring a change in the prison system. The State Attorney General defended the Director of the Department of Corrections throughout the entire litigation and the state of Arkansas actively participated in the litigation by payment of the attorneys and all necessary defense cost.

The facts in the present case are not similar to *Hutto, supra,* in any form. First, this case concerns allegations of police misconduct only. The plaintiffs presented no proof and agreed in the settlement of July 1, 1982 that *"no fault (was) found."* Emphasis added. *Hutto* was centered on the long standing nationally known brutality problems in the Arkansas correctional system. The instant case was a single isolated incident that has no historical basis and has not been repeated. The state of Arkansas supported and condoned the actions of its correctional officers by paying all legal fees, costs and monetary damages while the Commonwealth of Kentucky has refused to support the individuals who were sued in any form. The Attorney General of Kentucky did not defend the case. All damages, fees and costs were paid entirely by private funds. In short the Commonwealth has contributed nothing.

The federal court in *Hutto* also made a specific finding that the Arkansas Correctional Officers were acting in bad faith and that the state of Arkansas approved the officials' actions. Kentucky's method of handling the *Graham* case stands in stark contrast. A new Commissioner of State Police took over shortly after this incident and complete and thorough investigations were conducted internally first by the Kentucky State Police and second by the Justice Cabinet and externally by the Attorney General's Office. In short no factual similarities exist in *Hutto* and *Graham* and because the legal conclusion in *Hutto* is based on the facts, an award under the *Hutto* rationale is inappropriate in the case at bar.

III. NO AWARD OF ATTORNEYS' FEES OR COSTS MAY BE MADE AGAINST THE COMMONWEALTH OF KENTUCKY BECAUSE IT IS NOT A PART NOR IS AN ACTION PENDING AGAINST ANY EMPLOYEES OF THE COMMONWEALTH.

The Commonwealth of Kentucky was dismissed as a party by Order of this Court on November 26, 1980 and had not participated in this case since that date until it received the conflicting Order of September 9, 1982 holding it responsible for attorney's fees. Mr. Kenneth Brandenburgh, former Commissioner of the Kentucky State Police, was dismissed with prejudice on July 1, 1982. The order dismissing Mr. Brandenburgh stated: "No fault having been found as to *any claim* against the defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice . . . ." See Agreed Order Dismissing and Agreed Order Dismissing Settled. Because this Order dismissed any claim against Mr. Brandenburgh, it dismissed the claims against him in his official capacity as well as in his individual capacity. Paragraph one of this same Agreed Order also dismissed the State Police officers who remained in the lawsuit. The claims against these officers were also dismissed with prejudice. Simply put, there is no pending action and no party before this Court. Each and every defendant has been dismissed from this action. The case is final and the plaintiffs have shown no reason to reopen this case to attempt to obtain attorney's fees.

This case is totally different from the *Hutto* case. In *Hutto* the individual correctional official was before the Court. No claims had been dismissed against the correctional officials and the Court reasoned that it could, in that instance, because of the long documented history of state officials acting in bad faith and because of the District Court's repeated warnings that attorney's fees would

be assessed if the officials did not follow court's orders, the Supreme Court ruled that the state of Arkansas was in effect before the court through its agent, the correctional officer. The Commonwealth of Kentucky has no agents in this case. All of its employees, which the Commonwealth submits were acting individually and not in their official capacity, have been dismissed with prejudice as to all claims. Furthermore, even if these individuals were still present in the lawsuit, the Commonwealth is prejudiced because it has not participated in the settlement nor any other portion of the lawsuit since November, 1980. Thus because all defendants have been dismissed the Court should not levy fees or costs against the Commonwealth.

IV. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

The plaintiffs are not a prevailing party within the meaning of 42 U.S.C. §1988. This case was settled by all parties who had not been previously dismissed outright by the Court. The language of the Agreed Order of Settlement, which is below clearly states that no decision was made on the issues and that fault was not found to exist.

By agreement of the parties, it is so ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

The Commonwealth agrees that a successful plaintiff who has prevailed on important issues may recover attorney's fees for a settlement under limited circumstances. However the plaintiffs, have not shown why they should recover a fee from the Commonwealth in this case. The plaintiffs have not prevailed against the Commonwealth because the Commonwealth is not and was not a party. Furthermore, they did not prevail against any of the individual defendants, either in their individual or official capacities, because the language of the Order states that no fault was found. The plaintiffs and the defendants, who were not dismissed outright from the lawsuit including the Commonwealth, entered into an *in camera* settlement to which the Commonwealth was not and is not a privy and has not seen. These parties cannot bind the Commonwealth to a settlement *in absentia* and this Court should not permit it. If this Court permits the payment of attorney's fees in this case, they are setting the unfortunate precedent that a governmental body, which is dismissed outright from the case, has not participated in the case for approximately two years, and has acted in good faith at all times, may be held liable for attorney's fees. A ruling such as this, in effect, requires a governmental body to pay for attorney's fees in any case where a governmental employee is involved, either individually or officially, even if it is stipulated that no fault was found.

While the Commonwealth has not been privy to the *in camera* settlement agreement, various monetary figures were stated by attorney for the plaintiffs, Mr. Lowery, during the October 15, 1982 hearing. These figures are substantially less than the requested attorney's fees. The attorney's fees bear no relationship to the small sum for which the plaintiffs settled. The plaintiffs have failed to show that they are a prevailing party against the Com-

monwealth and this Court should vacate its Order granting attorney's fees and costs.

CONCLUSION

The Commonwealth asks that the Order of September 9, 1982 granting attorney's fees be vacated.

Respectfully submitted,

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OFFICE - SUPREME COURT, U.S.
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ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-849

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit Misapplied the Holding in *Hutto* v. *Finney*, 437 U. S. 678 (1978), When It Ruled That the Commonwealth of Kentucky Was Liable for Attorneys' Fees Under 42 USC § 1988 Even Though the Commonwealth Had Been Dismissed as a Party Defendant and Even Though the Relief Granted the Plaintiffs Against the Remaining Party Defendants Was Strictly Retrospective in Nature.

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The United States Court of Appeals for the Sixth Circuit Misapplied the Holding in *Hutto* v. *Finney*, 437 U. S. 678 (1978), When It Ruled That the Commonwealth of Kentucky Was Liable for Attorneys' Fees Under 42 USC § 1988 Even Though the Commonwealth Had Been Dismissed as a Party Defendant and Even Though the Relief Granted the Plaintiffs Against the Remaining Party Defendants Was Strictly Retrospective in Nature.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-849

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - - - - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY, - - - - - - - - - *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER

May it please the Court:

OPINION BELOW

The *per curiam* Opinion and Order of the United States Court of Appeals for the Sixth Circuit in this case is an unpublished opinion. It is nevertheless listed among the unpublished opinions as *Graham* v. *Wilson,* 742 F. 2d 1455 (6th Cir. 1984). The opinion and order are set out in full in the Appendix to the Petition for Writ of Certiorari, hereinafter "Pet. App.," 1a-2a.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit was entered on August 30, 1984. The petition for writ of certiorari was filed on November 26, 1984, and certiorari was granted on January 14, 1985. The jurisdiction of this Court is conferred by 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Eleventh and the Fourteenth Amendments. The text is set out below.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Eleventh Amendment to the United States Constitution.

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legis-

lature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article." Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 USC § 1983 and 42 USC § 1988. The text is set out below.

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 USC § 1983.

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USC § 1988.

STATEMENT OF THE CASE

On November 7, 1979, Kentucky State Trooper Eddie Harris was shot in cold blood at point blank range. Clyde Daniel Graham became the chief suspect when his step-mother's car was found in the vicinity with his driver's license and billfold being found in the bushes nearby. The Kentucky State Police assembled a group of troopers and searched the home of Clyde's father, James E. "Buddy" Graham. The six plaintiffs were arrested at this time. Physical injuries were caused to Buddy Graham. State Police Commissioner Kenneth Brandenburgh was not present nor did he participate in the initial decision to go to Graham's home. Commissioner Brandenburgh drove to the Elizabethtown vicinity and was in the vicinity during the second search. Brandenburgh, nevertheless, denied participating in the search. Pet. App., 4a.

The plaintiffs filed suit on September 16, 1980, against the Commonwealth of Kentucky, the state police officers involved in the search solely in their individual capacities, Kenneth Brandenburgh both individually and in his official capacity as Commissioner of the State Police, the City of Elizabethtown, the City of Hodgenville, and police officers of the City of Elizabethtown, the City of Hodgenville, and Hardin County who were involved in the search, in their individual capacities only. The plaintiffs sought monetary damages. They have not sought injunctive or declaratory relief at any time.

The Commonwealth of Kentucky was dismissed as a party on November 26, 1980. Pet. App. 14a. The

district court dismissed the Commonwealth of Kentucky based on the Eleventh Amendment to the United States Constitution. The court further stated in its order that:

> ". . . The relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978), and *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that attorney's fees may be awarded against the state in an action by a private litigant only when the relief sought is prospective in nature . . ." Pet. App. 14a.

As the result of the foregoing order the Commonwealth of Kentucky did not participate any further in this case until the question of counsel fees was raised.

The Attorney General of Kentucky filed a report after investigating the events which occurred during the search of the Graham home. The report concluded that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Pet. App. 26a-28a. As a consequence of the failure of these officers to observe state policy, the Commonwealth of Kentucky has never supported either the Kentucky State Police troopers who were named individually or Kenneth Brandenburgh in any manner. Each of these individuals has been represented by a private attorney who was paid by private funds throughout the case. The Commonwealth of Kentucky has not contributed to or paid the costs of litigation for any of the troopers or for the Commissioner. The Commonwealth of Ken-

tucky specifically did not contribute in any form or fashion to the monetary damages that the named defendants agreed to pay in settlement of the case.

The Commonwealth of Kentucky was not notified of any negotiations to settle this case and did not participate in the negotiations. The Commonwealth was not served with and did not see a copy of the *in camera* settlement until after both the appellants' and the appellees' briefs were filed in the United States Court of Appeals for the Sixth Circuit. In other words, the resulting July 1, 1982, settlement was fashioned without the Commonwealth of Kentucky being represented. This settlement details that the plaintiffs shall receive $45,000.00 in damages paid on an installment basis from Kenneth Brandenburgh personally and as agent for the Kentucky State Police Legal Fund, a voluntary association. The City of Elizabethtown had previously settled with the plaintiffs for $5,000.00. Hardin County settled with the plaintiffs for $10,000.00 for and on behalf of Dewey Skaggs, Charles David Logsdon, Overland Payne and David Owsley. The District Court did not assess any costs or attorneys' fees against either the City of Elizabethtown or Hardin County. Contrary to the respondents' assertions, the *in-camera* agreement does not address fault. A copy of the *in-camera* settlement is contained in a sealed envelope in the Office of the Clerk of the United States Supreme Court.

On July 1, 1982, the District Court entered an order styled, Agreed Order Dismissing Settled. The settlement is as follows:

"By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.
3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.
4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.
5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kenturky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved." Pet. App. 15a to 17a.

No attorney for the Commonwealth signed the Agreed Order nor was advised of the Order until after the fact. The Commonwealth likewise had no knowledge of the language of underlying *in-camera* settlement until over sixteen months later.

On September 2, 1982, Judge Allen signed an order granting the plaintiffs attorneys' fees from the Commonwealth of Kentucky without holding a hearing. Pet. App. 18a. The Commonwealth had no notice prior to the signing of this Order that attorneys' fees were being sought. The Commonwealth through the Justice Cabinet and through the Office of Attorney General filed Motions to Vacate the Order granting attorneys' fees and supporting Memoranda. The Court held a hearing on November 2, 1982, to decide whether attorneys' fees should be allowed and, if allowed, the amount of the fees. On November 15, 1982, the Court found that the Commonwealth was responsible for the plaintiffs' costs in the amount of $64,878.82, including $58,521.71 in attorneys' fees, even though the Commonwealth and Commissioner Brandenburgh had been dismissed as party defendants, and even though the troopers were dismissed as parties. Pet. App. 12a, 13a. Perhaps it is even more important to note that the plaintiffs sought only damages. The plaintiffs did not ask for nor did they receive declaratory or injunctive relief at any time. In connection with the foregoing relief, the Court directed that no claim for attorneys' fees shall be made by any of the plaintiffs against any individual defendants. Pet. App. 16a. The court did not assess any costs in the action against either Hardin County or the City of Elizabethtown.

The United States Court of Appeals for the Sixth Circuit upheld the lower court's decision.

SUMMARY OF THE ARGUMENT

The Eleventh Amendment to the United States Constitution renders an unconsenting state immune from suit in federal court. Although this court has construed the Eleventh Amendment as an absolute bar to an award of damages against a state, it has never construed the Amendment to bar relief which has the practical effect of prospective relief against a state.

Under the "American" rule a prevailing litigant is not entitled to attorneys' fees from the losing party in absence of statutory authority. In adopting 42 USC § 1988 Congress has provided for attorneys' fees to the prevailing party in civil rights actions under the "private attorney general" theory. The Eleventh Amendment, however, prohibits awarding attorneys fees against a state unless the fees are ancilliary to prospective relief on the merits. *Hutto* v. *Finney,* 437 U. S. 678 (1978).

The Sixth Circuit misapplied *Hutto, supra* to the instant case. In *Hutto,* the relief awarded by the court was against the state and prospective in nature. In the case at bar, the state was dismissed as a party defendant, and the relief imposed against the remaining defendants was limited to damages.

In adopting 42 USC § 1988 Congress provided that fees were to be awarded only to a prevailing party. Contrary to *Hutto, supra* the district court awarded attorneys' fees against the Commonwealth despite the fact that the Commonwealth was a prevailing party. Vicarious liability is an improper basis for imposing liability on a sovereign unless there is proof that the

individual found liable was following a policy adopted by the sovereign. In the case at bar, the proof indicated that the individual defendants were violating state policy. As a result the Commonwealth refused to either represent them or provide for their representation.

The Sixth Circuit misapplied *Hutto, supra* and violated the Eleventh Amendment by rendering a decision affirming the district court.

ARGUMENT

The United States Court of Appeals for the Sixth Circuit Misapplied the Holding in *Hutto* v. *Finney*, 437 U. S. 678 (1978), When It Ruled That the Commonwealth of Kentucky Was Liable for Attorneys' Fees Under 42 USC § 1988 Even Though the Commonwealth Had Been Dismissed as a Party Defendant and Even Though the Relief Granted the Plaintiffs Against the Remaining Party Defendants Was Strictly Retrospective in Nature.

In the case at bar the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Western District of Kentucky, awarding respondents, plaintiffs below, in a 42 USC § 1983 action $64,878.82 in costs, including $58,521.71 in attorneys' fees against the Commonwealth of Kentucky. In its *per curiam* opinion the Sixth Circuit reasoned that it was proper under *Hutto* v. *Finney,* 437 U. S. 678 (1978), to award under 42 USC § 1988 costs including attorneys' fees against the state in a civil rights action, even though the state was dismissed as a party defendant, and even

though the relief awarded against the remaining defendants was strictly retrospective in nature. The decision of the Sixth Circuit requires the Commonwealth of Kentucky to pay the costs in a civil rights action despite the fact that Kentucky was a prevailing party as to the plaintiffs and despite the fact that the relief was limited to damages.

I.

The Relief Granted on the Merits Was Strictly Retrospective.

A. THE GENERAL RULE AS TO ATTORNEYS' FEES

In *Alyeska Pipeline Services Co.* v. *The Wilderness Society,* 421 U. S. 240 (1975), this Court set out the general rule as to attorneys' fees. This "American" rule is as follows:

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. . . ." *Id.,* at 247.

There are two principal exceptions to the "American rule." First, a court may in exceptional circumstances award an attorney's fee to a prevailing party when the losing party has acted in "bad faith."[1] Secondly, a court may award an attorney's fee when authorized to do so by federal statute. In *Alyeska, id.,* this Court rejected a counsel fee based upon a determination by a court that private counsel vindicated a significant governmental interest. This Court said that in absence of

[1]The case at bar does not involve the "bad faith" exception. The attorneys' fees were awarded under 42 USC § 1988.

statutory authority the "private attorney general" theory could not support an award of counsel fees.

In *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400 (1968) a reasonable counsel fee was approved under the "private attorney general" theory. But the theory had been adapted by Congress as a basis for a fee in 42 USC § 2000a-3(b). In *Northcross* v. *Board of Education,* 412 U. S. 427 (1973), a reasonable counsel fee based upon another statute invoking the "private attorney general" theory was likewise approved. In *Northcross, Id.,* the statutory basis was § 718 of the Emergency School Aid Act of 1972, 86 Stat. 369.

In *Hutto, supra,* this Court considered a civil rights action against officers of the Arkansas penal system. The district court found that the conditions in the penal system constituted cruel and unusual punishment and fashioned injunctive relief to remedy the situation. The district court also found "bad faith" on the part of the defendants and awarded plaintiff an attorney's fee to be paid out of the funds of the Arkansas Department of Corrections. The Court of Appeals affirmed and awarded the appellee an attorney's fee for the appellate work as a prevailing party under 42 USC § 1988. In approving the attorney's fee awarded by the district court, this Court indicated that the fee vindicated the Court's authority over a recalcitrant litigant. However, the attorney's fee awarded by the Court of Appeals had to be examined further since it was not based on "bad faith."

B. THE EFFECT OF THE ELEVENTH AMENDMENT ON ATTORNEYS' FEES

The Eleventh Amendment has long been interpreted as rendering an unconsenting state immune from suit brought in federal court by citizens of that state[2] *Hans* v. *Louisiana,* 134 U. S. 1 (1890). However, the Eleventh Amendment does not prohibit a federal court from enjoining state officials. *Ex parte Young,* 209 U. S. 123 (1908). Although this Court reiterated in *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that the Eleventh Amendment is no bar to prospective relief against state officials, it made it quite clear that the Amendment does operate as a bar to retrospective monetary relief against a state. Congress is, nevertheless, authorized by Section 5 of the Fourteenth Amendment to abrogate the immunity provided by the Eleventh Amendment. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976).

A federal district court may award counsel fees in absence of a finding of "bad faith" whenever Congress provides a statutory basis. In 42 USC § 1988 Congress provided a statutory basis for attorneys' fees to prevailing parties in civil rights cases brought under 42 USC §1983. However, when a state is involved in the litigation and is the losing party, the Eleventh Amendment bars a recovery of counsel fees unless Congress has abrogated the Amendment.

> "As this Court made clear in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 . . . Congress has plenary

[2]Kentucky has never consented to being sued in federal court. This, however, is not an issue in question in the case at bar.

power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed the Act primarily applies to laws passed specifically to restrain state actions. See e.g., 42 USC § 1983 [42 USCS § 1983]." *Hutto, supra* pp. 693, 694.

Congress adopted 42 USC § 1983 pursuant to Section 5 of the Fourteenth Amendment in an effort to enforce Section 1 of the Amendment. Congress adopted 42 USC § 1988 in 1976 in an effort to encourage public policy by enforcing the civil rights laws. The purpose of 42 USC § 1988 was to promote the use of a "private attorney general" to preserve the rights of the people.

It is abundantly clear that Congress has abrogated the Eleventh Amendment in order to provide attorneys' fees for prevailing litigants under 42 USC § 1983. But in order to determine the extent of abrogation it is necessary to examine the legislative history of 42 USC § 1988.

> "* * * There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." Senate Report No. 94-1011, 94th Congress, Second Session, 1976, 5 U. S. Code Congressional and Administrative News 5908, p. 6.

Congress had enforcement in mind when it adopted 42 USC § 1988. In 42 USC § 1988 Congress authorized attorneys' fees to prevailing litigants when the courts grant prospective relief against state officers. Congress did not intend for 42 USC § 1988 to authorize attorneys' fees against a state when damages alone are awarded.

Edelman, supra, held that the Eleventh Amendment was a bar to retrospective relief against a state but that it was not a bar to prospective relief against a state officer with an ancillary effect on the state treasury. *Hutto, supra,* held that attorneys' fees are properly part of the ancillary effect on the state treasury when prospective relief is granted.

> "* * * The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards. H R Rep No 94-1558, p. 9 (1976). . . ." *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U. S. 719, 738, 739 (1980).

In *Hutto, supra,* the plaintiff prevailed against state officers and in doing so obtained prospective re-

lief. The Court of Appeals awarded an attorney's fee under 42 USC § 1988 to the prevailing party against the state. The award of the attorney's fee had an impact on the Arkansas Treasury ancillary to the injunctive relief granted on the merits.

On the other hand, the situation in the case at bar is vastly different from that in *Hutto, supra.* The respondents did not prevail against the Commonwealth of Kentucky. The respondents prevailed against the remaining defendants and solely in their individual capacities. The relief granted the respondents was retrospective rather than prospective in nature. The Sixth Circuit, nevertheless, held *Hutto, id.,* applicable and awarded costs including attorneys' fees directly against the Commonwealth of Kentucky. The Court awarded no costs against any of the other named defendants.

The Decision of the Court of Appeals for the Sixth Circuit is contradictory to the rationale of *Hutto, supra,* and the line of cases leading up to the *Hutto* decision. The decision of the Sixth Circuit is in total disregard of the Eleventh Amendment to the United States Constitution.

II.

The Commonwealth of Kentucky Was a Prevailing Party as to the Plaintiffs.

The Eleventh Amendment to the United States Constitution is a bar to an action in federal court against a state. *Pennhurst State School and Hospital* v. *Halderman,* —— U. S. ——, 79 L. Ed. 2d 67, 104

S. Ct. 900 (January 23, 1984). Congress, of course, is authorized by Section 5 of the Fourteenth Amendment to abrogate the immunity provided by the Eleventh Amendment. *Fitzpatrick, supra.* But the intent to override the Eleventh must be unequivocal. *Quern* v. *Jordan,* 440 U. S. 332 (1979).

The Eleventh Amendment has no application when a municipality is named as a party defendant. *Monell* v. *New York City Department of Social Services,* 436 U. S. 658 (1978). This Court, nevertheless, held in *Monell, id.,* that a municipality cannot be held liable solely on the basis of vicarious liability. In order to support a claim against a municipality for a violation of civil rights, a party must demonstrate that the officers of the municipality were by their acts advancing a policy adopted by the city.

A state may not be named as a party defendant by virtue of the Eleventh Amendment. It is, nevertheless, proper for a Court when fashioning prospective relief against state officers to award counsel fees having only an ancillary effect on the state treasury. This is because the prospective relief against the state officers is for all practical purposes an injunction against the state. *Hutto, supra.* Surely this does not mean, however, that when a state is involved rather than a municipality, the party seeking attorneys' fees should be held to a lesser standard of proof as to whether the officer was following state policy. Yet this is exactly what has occurred in the instant case. The Sixth Circuit affirmed an award of attorneys' fees against the Commonwealth of Kentucky despite the fact that

Commonwealth was dismissed as a party defendant and despite the fact that no prospective relief was awarded to the respondents. The award of attorneys' fees was made solely on the basis of *respondeat superior* and was in violation of *Monell, supra,* since there was no proof that the Commonwealth had adopted a policy approving conduct such as was exhibited by the police officers in the search of the Graham house. In fact, the proof shows exactly the opposite. The appendix to the memorandum submitted by the Attorney General in support of his Motion to Vacate the Order Granting Attorneys' Fees contains a Report of the Attorney General. Pet. App. 26a-28a. The report concludes that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Pet. App. 26a-28a. The officers violated state policy during the search. The Commonwealth of Kentucky refused to either represent the police officers or to provide counsel for them. Further, the Commonwealth refused to pay any of the costs or damages assessed against the officers.

In *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981) the Court of Appeals for the Third Circuit considered a case wherein Morrison sued the City of Pittsburgh and several of its police officers under 42 USC § 1983 for false arrest. In a non-jury trial the district court found for Morrison as to the police officers and awarded damages. The court found for the City of Pittsburgh as to the claim of Morrison because the evidence failed to demonstrate that the individual acts of the police officers were an implementation of the city's policy.

No prospective relief was awarded. The district court awarded Morrison an attorney's fee against the officers but not against the city. In affirming the denial of an attorney's fee against the City of Pittsburgh, the Court of Appeals said:

> "* * * Before Morrison can obtain costs he must, against the city, be a prevailing party. In a case such as this, in which he sought only money damages, and in which he failed to satisfy the court that his case satisfied the standards of *Monell* v. *Department of Social Services, supra,* he does not qualify as the prevailing party with respect to the only claim which was before the court . . . ." *Morrison, Id.,* p. 88.

In *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980), the United States Court of Appeals considered a civil rights action against a county, city, and law enforcement officers for unlawful arrest and for cruel and unusual punishment. The district court dismissed the county and city from the action but rendered a judgment on a jury verdict against two law enforcement officers. The court awarded attorneys' fees against the law enforcement officers but not against the county and city. No injunctive relief was fashioned. In reviewing the denial of attorneys' fees against the county and city, the Fifth Circuit said:

> "* * * Appellants have cited no authority for the proposition that attorneys' fees may be awarded against parties properly dismissed from the action merely because they were 'prevailing parties' with respect to other parties in the suit.

> Indeed, an award against Brazoria County and the City of Clute under the circumstances of this case would turn the meaning of 'prevailing party' on its head, since the district court expressly found, as a matter of law, that neither entity was liable to the appellants. The failure to award attorneys' fees against Brazoria County and the City of Clute was proper." *Dean, supra,* pp. 1337, 1338.

Two years later in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982), the Fifth Circuit reiterated its position. In *Berry, id.,* the plaintiff filed a civil rights action against the Town of Maben, Mississippi and McLemore, a police officer employed by the town. The plaintiff sustained injuries during an arrest made by McLemore. Berry alleged that the town was liable vicariously and directly for the injuries. The trial court directed a verdict for the town and entered a judgment pursuant to a jury verdict for the plaintiff against the police officer in the amount of $10,000. The court assessed the police officer $5,000 in attorneys' fees. The court refused to award attorneys' fees against the town. No prospective relief was granted. In affirming the refusal of the trial court to assess attorneys' fees against the town the Fifth Circuit said:

> "* * * A plaintiff in a § 1983 suit may not be awarded attorneys' fees against a party properly dismissed from the action merely because the plaintiff prevailed against another party in the suit. This is so even where the party dismissed from the suit is the governmental entity that employed the culpable defendant. *Dean* v. *Gladney,* 621 F. 2d 1331, 1337-38, (5th Cir. 1980), *cert. denied,* 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981)." *Berry, supra,* p. 34.

In *Morrison, supra; Dean, supra;* and *Berry, supra,* the respective Courts of Appeals held that where no prospective relief was awarded any defendant, and where the county or municipality was properly dismissed as a party defendant, no attorneys' fees could be assessed against the county or municipality. The decisions in these cases are contrary to that reached in the case at bar.

In *Hutto, supra,* the relief entered against the Arkansas Penal System was prospective in nature and was for all practical purposes against the State of Arkansas. Arkansas was not a prevailing party. In the case at bar the Commonwealth of Kentucky was dismissed as a party defendant. The relief on the merits was strictly against the other named defendants in their individual capacities. These defendants had violated state policy. Unlike the situation in *Hutto, id.,* the relief was not against the Commonwealth. In awarding the attorneys' fees in the case at bar the district court violated the Eleventh Amendment to the United States Constitution. The only basis for attorneys' fees in the case at bar was vicarious liability in violation of *Monnell, supra.* The proof shows that the police officers were acting contrary to state policy.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit misapplied a decision of this Court when it

held that *Hutto, supra,* authorized attorneys' fees in the case at bar. In *Hutto, id.,* the relief was prospective, the Attorney General had defended the corrections officers all along, the state of Arkansas never indicated that the officers were violating state policy, the litigation involved the state policy as to prison conditions which had been perpetrated for years, and Arkansas was the losing party. On the other hand, in the instant case, the relief was strictly retrospective, the Commonwealth was dismissed as a party defendant, the Commonwealth did not provide for the representation of the officers or for the settlement, and finally, the Report of the Attorney General indicates that the police officers violated state policy.

We submit that this Court should for the foregoing reasons reverse the Opinion and Order entered herein by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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I, George M. Geoghegan, Jr., one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondents by depositing three copies of same in the United States mail, first class postage prepaid, this 27 day of February, 1985, addressed to:

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No. 84-849

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE,
Petitioner,

v.

JAMES E. GRAHAM, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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24 pp

QUESTION PRESENTED

Whether Congress intended in the Civil Rights Attorney's Fees Awards Act to authorize a fee award against a state in a section 1983 damages case, where the state was not, and could not have been, held responsible to pay the relief won on the merits.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-849

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE,
Petitioner,

v.

JAMES E. GRAHAM, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

MOTION OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The above-named associations hereby move, pursuant to Rules 36 and 42 of this Court's rules, for leave to file the attached brief amicus curiae supporting petitioner in No. 84-849, *Commonwealth of Kentucky v. Graham.* Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has declined to do so.

Movants are organizations whose members include state, county and municipal governments and officials located throughout the United States. The members of each organization are vitally concerned with legal issues affecting the potential financial liabilities of state, county, and municipal governments.

The question presented here involves the obligation of these governments to pay the attorney's fees of prevailing plaintiffs in civil rights damages cases brought against individual governmental employees. In view of the explosion in recent years of civil rights suits under 42 U.S.C. § 1983 and other provisions, the cost of the fee liability at issue here is likely to be quite significant. Movants have an interest in not being forced to shoulder this additional financial load based on what they view as a patently erroneous analysis of congressional intent in enacting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.

But their concern is more than financial. The lawsuits at issue here are damages suits against individual governmental employees. The fee awards that, under the Sixth Circuit rule, would be imposed on states and other governmental bodies would come after such lawsuits have been litigated and/or settled by other parties—*i.e.*, the plaintiff and the individual defendant. In the view of movants, such a separation of fee liability from merits liability creates a significant potential for abuse of the fee-shifting authorized by section 1988.

The attached brief focuses on these concerns. For the reasons stated above, movants ask that their motion be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-849

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE,
Petitioner,

v.

JAMES E. GRAHAM, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE*

INTEREST OF AMICI

The interest of amici appears from the foregoing motion.

STATEMENT

This case raises an important question concerning the obligation of states (and, by extension, counties and municipalities) to pay the attorney's fees of plaintiffs bringing damages suits against governmental officials under 42 U.S.C. § 1983. It arises from a police brutality case involving state and local officers, in which the plaintiff negotiated a settlement of $60,000 in damages pay-

able by the state police commissioner [1] and two municipalities.[2] This settlement specifically excluded any payment of attorney's fees by the defendants, but authorized the plaintiffs to seek fees from the Commonwealth of Kentucky. Pet. App. 16a. In a subsequent motion, the plaintiffs won an order under 42 U.S.C. § 1988 requiring the state to pay them over $58,000 in fees and over $6,000 in other expenses. On appeal, the Sixth Circuit upheld this award in a short *per curiam* opinion which relied solely on this Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978).

There are several aspects of the proceedings below that require emphasis. First, the only relief ever sought by the plaintiffs was damages; there was no claim for equitable or declaratory relief from any state laws, policies or patterns of conduct. Second, while the Commonwealth of Kentucky was initially named as a defendant, the court never made any finding that the state had in any way authorized the tortious conduct of the individual police defendants. Finally, in such a setting, the court was required to deny all merits relief against the state under the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979). It recognized this obligation by dismissing the Commonwealth as a defendant almost two years before the settlement by the other parties.

Despite these circumstances, the courts below somehow saw fit to impose fee liability on the Commonwealth of Kentucky. Such a ruling represents a real threat to every state, county or town across the country, because it opens up the possibility of fee awards payable out of public

[1] A number of other individual state police officers were named as defendants. Apparently their share of the liability was represented by the $45,000 settlement with Commissioner Brandenburgh, which was payable, in installments, by him personally and as agent for the "Kentucky State Police Legal Fund." Pet. App. 4a.

[2] The City of Elizabethtown settled for $5,000. Hardin County settled for $10,000.

funds in a wide variety of cases where governmental entities are not even proper parties. As it is without legal basis, this decision must be reversed.

SUMMARY OF ARGUMENT

1. In the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, Congress authorized fee awards only against those parties responsible for the relief on the merits. This is the clear rule in suits against judges. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Pulliam v. Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984). There is no reason for a different rule authorizing fee liability on the part of the states in damages cases, where they can never be liable on the merits. Although the court below relied on *Hutto v. Finney*, 437 U.S. 678 (1978), the court erred as that decision only reinforces the principle that fee liability should be tied to merits liability.

2. Even if section 1988 could be read to impose fee liability on governmental entities in some cases where they are not liable on the merits, it could not be so read in a case involving a state. Any imposition of fee liability on states in such a case would constitute an abrogation of the Eleventh Amendment. Such an abrogation must be authorized by Congress in terms far more explicit than those used in section 1988. *Quern v. Jordan*, 440 U.S. 332 (1979).

3. Imposing fee liability on states in cases involving damages claims against their employees would lead predictably to overcompensation of plaintiffs. This is the likely result of the separation of the party liable on the merits from the party liable for fees.

ARGUMENT

The Sixth Circuit, in awarding attorney's fees against a state based upon the liability of an individual officer for damages, was mistaken for several reasons. First, nothing in section 1988 remotely suggests that Congress in-

tended governmental bodies to be liable for fees in cases where they are not liable, directly or indirectly, for the underlying relief. Second, even if, in some cases, section 1988 could be read to allow that result it would still lack the clear intent to abrogate the states' Eleventh Amendment immunity from awards in cases seeking retroactive relief. Finally, the unhinging of liability for fees from liability on the merits would lead to serious and unjustified impositions on state and municipal treasuries.

I. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT DOES NOT AUTHORIZE FEE AWARDS PAYABLE BY STATES IN CASES WHERE INDIVIDUAL OFFICIALS HAVE BEEN HELD LIABLE FOR DAMAGES.

In the view of *amici*, there is no need in this case for the Court to do more than to apply the relevant statute as Congress intended. No plausible interpretation of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, supports the holding that states or municipalities are liable for attorney's fees in cases where they are not liable for the underlying relief.[3] On the contrary, this Court has already recognized, in the context of suits against judges, that the liability of a given entity for a fee award under section 1988 depends on whether that party or entity is validly obligated to provide the merits relief. *See, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). The sole authority cited by the Sixth Circuit for its erroneous position, *Hutto v. Finney*, 437 U.S. 678 (1978), only reinforces this principle.

[3] We highlight this *statutory* analysis because of its importance for counties and cities that may, in the future, be threatened with fee awards in damages cases involving their employees. Unlike petitioner here, such governmental entities may be unable to claim the shield of the Eleventh Amendment. *See* section II *infra*. But that does not alter the fact that, under section 1988, they cannot be held liable for fees unless they have *lost* a case.

The notion that liability for fees would be tied to liability on the merits is hardly a radical one. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), a case challenging rules against lawyer advertising, this Court vacated an award of attorney's fees against the state supreme court responsible for promulgating the rules. In so doing, it relied expressly on the fact that the defendant court had absolute immunity for the legislative act of promulgating the rules, and thus could not be held liable even prospectively on that basis. *Id.* at 737-39. The Court saw no indication that "Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." *Id.* at 738.

This link between merits liability and liability for fees under section 1988 was reaffirmed only last Term in *Pulliam v. Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984). There, the Court faced the question whether fees could be assessed under section 1988 against a defendant judge charged with a civil rights violation. Again, the Court viewed this issue as essentially dependent on the "more fundamental question . . . whether a judicial officer acting in her judicial capacity should be immune from prospective injunctive relief" on the merits. *Id.* at 1974. Having found that the judge enjoyed no such immunity, the Court concluded that she could also be held liable for fees under section 1988.

These principles do not vanish, as the court of appeals seemed to believe, merely because *another* party has been found liable on the merits. In *Consumers Union*, for example, an injunction had been entered against the Virginia State Bar for enforcing the rule promulgated by the Supreme Court in its legislative capacity. The district court, noting that the Bar had urged the Supreme Court to modify the rules, had concluded that fairness required the imposition of a fee award on the Court and not the Bar. This Court disagreed, finding "no indica-

tion that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief." 446 U.S. at 739.

The proper inquiry in assessing the liability of a State or municipality for fees, therefore, is whether the particular governmental body is accountable for the underlying relief. The answer will depend on both the nature of the case and the nature of the defendants. Where a municipality is concerned, for example, a plaintiff may choose to sue either the municipality itself or one of its officials in his or her "official capacity." Regardless of the choice of defendant, however, the municipality is liable for merits relief only if the underlying civil rights violation was committed pursuant to an official policy. *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978) (damages); *Rizzo v. Goode*, 423 U.S. 362, 373-77 (1976) (injunctive relief). In any other case, a plaintiff may prevail only against the municipal employee responsible for the civil rights violation, and thus may only collect fees from that same party. *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Morrison v. Fox*, 660 F.2d 87, 88 (3d Cir. 1981); *Dean v. Gladney*, 621 F.2d 1331, 1337-38 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

Suits seeking relief payable from a state treasury are even more restricted because of the Eleventh Amendment. To begin with, no suits may be filed in federal court against a state in its own name; relief can only be sought in suits against state officials "in their official capacity." *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*). Even more importantly, the relief sought must be *prospective* in nature and based on a federal claim. *See Ex Parte Young*, 209 U.S. 123 (1908). Even though such a suit is, in substance if not in form, a suit against a state, this Court has recognized an exception to the Eleventh Amendment because of the need to have some mechanism to

"promote vindication of federal rights." *Pennhurst State School and Hospital v. Halderman*, —— U.S. ——, 104 S. Ct. 900, 910 (1984). In any other case, however, the state itself is not obligated to pay for the relief won in a suit against one of its officials, and should not be liable for the fee award either. *Glosen v. Barnes*, 724 F.2d 1418, 1421 (9th Cir. 1984).

The problem with the decision below was its failure to focus on the nature of the case before it and on the issue of who was responsible for the relief on the merits. This is a pure damages case against state officials. It is not, therefore, a case in which, under any theory, the state could be responsible to pay for the court's decree. On the contrary, as we have noted, it is simply impermissible for a plaintiff in federal court to sue a state for damages *or* to sue the state's officials "in their official capacity"[4] or in any other manner that would imply an obligation to pay "retroactive" relief. *E.g., Edelman v. Jordan*, 415 U.S. 651, 663-65 (1974). The only way to sue a state official for damages under section 1983 is to sue him *as an individual.* The wrong being redressed may be constitutional in nature because of the official position held by the defendant, but it is nevertheless a wrong for which the official, and not the state, is solely responsible.[5]

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[4] *Cf. Brandon v. Holt*, 105 S. Ct. 873, 878 (1985) (suit against city official "in his official capacity" is equivalent to suit against city).

Here, the district court seemed to rely on the fact that one of the defendants was the "highest ranking" state police officer, and that all of the defendants acted "in their official capacities." Pet. App. 6a-7a. The plaintiffs, for their part, sought to name Commissioner Brandenburgh as a defendant both in his individual *and official* capacities. None of these facts, however, alters the nature of the lawsuit, which was brought against individual state employees for damages only.

[5] If a defendant official is following a state policy, there will be a basis for injunctive relief against him in his official capacity. In

Nothing in the language of section 1988 or in its legislative history supports the idea that a state treasury may be reached to pay attorney's fees in a suit for damages against an individual official. Section 1988 provides that in cases under section 1983 and certain other civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs.*" (Emphasis added.) Although section 1988 does not define the parties to be held responsible for the "costs," the logical place to look, at least where the plaintiff is the "prevailing party," is to the defendants responsible for the relief itself. "Costs," after all, are generally awarded "against the losing party and as an incident of the judgment." [6] The term itself, therefore, suggests that the party paying for the merits relief and the party paying fees should be one and the same.

The legislative history, though sparse, follows the same track. While Congress did express an intent to allow fee awards payable out of state treasuries, it viewed such awards as "ancillary" to suits "securing compliance" with federal civil rights laws.[7] This phrasing seems a clear reference to the *injunctive* suits by "private attorneys general" that were at the heart of the concerns leading to section 1988.[8] *See also, Edelman v. Jordan, supra,* 415 U.S. at 668 (an "ancillary effect" on the state treasury is permissible under the Eleventh Amendment in

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such a case, if the plaintiff nevertheless seeks only damages, the presence of an illegal state policy cannot alter the fundamental nature of the damages claim; it remains one asserted against the defendant official only in his individual capacity.

[6] *Moore's Federal Practice* ¶ 54.70 [1], at 1301. *See also* Fed. R. Civ. P. 54(d).

[7] S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5913.

[8] *See id.* at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5910.

injunctive cases). Such suits, of course, are ones in which the state *is* liable to pay for the merits relief.[9]

The decision below, therefore, rests solely on a reading of the decision in *Hutto v. Finney, supra,* a case that, far from overturning the distinction between suits for damages and suits for injunctive relief, gave special emphasis to that distinction. The issue in *Hutto* was the availability of fee awards under section 1988 in cases in which state officials are sued for injunctive relief in their "official capacity." The case involved conditions in the Arkansas prison system, which were found to require federal judicial intervention. The named defendants were the State Commissioner of Corrections and members of the state Board of Corrections. Claims for damages were not at issue.

All that *Hutto* held was that, in such cases, the losing defendant (the state official sued in his official capacity) not only may be held responsible for correcting the constitutional violation, he may also be subjected to a fee award under section 1988. As the Court put it:

> Congress undoubtedly intended to . . . authorize fee awards payable by the states *when their officials are sued in their official capacity.* The Act . . . contains no hint of an exception for states defending injunction actions. . . .

437 U.S. at 693-94. In so holding, the Court relied on the recognition that "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself." 437 U.S. at 700. Because of this reality, the Court held, it was Congress's intent that the fee award also be paid by the same losing party —the State or (more accurately) its employee in his offi-

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[9] Congress also intended to authorize fee awards in *damages* cases—*i.e.*, cases where *states* are immune from liability. H. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976). But it gave no indication that such fee awards should be imposed on someone other than the person liable for the damages—the individual defendant.

cial capacity. *Id.* In short, nothing in *Hutto* undercuts the principle that a "state" must be properly responsible for the merits relief before it may be saddled with a fee award under section 1988. That is exactly what happend in that case.

By misapplying *Hutto* to a pure damages case, the decision below threatens to open up a whole new area of potential state and municipal liability. After all, the number of cases allowing injunctive relief against a state or city is far smaller than the number of cases in which individual officials face liability in damages. The facts of this case alone—involving alleged police brutality during a house search—should make that clear. Congress plainly did not intend, regardless of any immunity from damages themselves, that taxpayers be held responsible for attorney's fees in every such case. On the contrary, it intended that fees be the responsibility of the losing party—the party responsible for the merits relief. In a section 1983 damages case against an individual official, that party is the official himself.

II. ANY DOUBT ABOUT THE PROPER STATUTORY INTERPRETATION MUST, IN LIGHT OF THE ELEVENTH AMENDMENT, BE RESOLVED IN FAVOR OF THE STATE.

Even if section 1988 could be read to authorize fee awards against governmental bodies in some circumstances where they are not liable for the merits relief itself, it could not be read to authorize such awards against *state* governments. Any such authorization would constitute a congressional abrogation of their Eleventh Amendment immunity from suit.[10] Under well-established case law, section 1988 falls far short of the kind of legislative expression that would be required to find such an abrogation.

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[10] Congress has the power to abrogate the Eleventh Amendment in order to protect rights embodied in the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The Court has made it clear that when Congress wants to abrogate the Eleventh Amendment, it must do so "explicitly and by clear language." *Quern v. Jordan, supra*, 440 U.S. at 345; *see also Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 284 (1973). The Court will not find an abrogation in general statutory language, like that in section 1988, which does not refer specifically to state liability.

Nothing in *Hutto v. Finney, supra*, altered these clear principles. There, as we have noted, this Court concluded that Congress had authorized fee awards against states in cases involving prospective relief. In so concluding, the Court devoted considerable attention to the issue whether section 1988—in authorizing fee awards against all losing defendants—was sufficiently clear to abrogate the state's Eleventh Amendment immunity in such cases. The majority held that, where the fees are ancillary to injunctive actions against states that are not barred by the Eleventh Amendment, there is no need for a specific, express abrogation of the states' immunity from fee awards. 437 U.S. at 694-98.

At the same time, however, the Court made it clear that a very different standard would apply to any statute alleged to abrogate state immunity in cases involving "retroactive" relief. The state defendants in *Hutto* directed the Court's attention to the cases holding that waivers of state sovereign immunity require "an extraordinarily explicit statutory mandate." *Id.* at 695. Rather than rejecting these cases, the Court distinguished them on the ground that they concerned "retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking *only prospective relief.*" *Id.* (emphasis added). Then, in a footnote, the Court made even clearer the kind of case in which it believed Congress had authorized a fee award against a state: "An award of costs will almost invariably be incidental to an award of prospective relief, for costs are generally

awarded only to prevailing parties . . . and only prospective relief can be pursued by an individual in a suit against a State." *Id.* at 695 n.24 (citation omitted).[11]

There could be no better indication that *Hutto* created only a limited exception to the general rule that congressional abrogations of the Eleventh Amendment must be clearly and specifically expressed. Indeed, in *Quern v. Jordan*, *supra*, this Court expressly adopted the reading of *Hutto* set out here. The Court distinguished *Hutto* in these terms:

> While *Hutto* [unlike *Fitzpatrick v. Bitzer*, *supra*, and *Employees v. Department of Public Health and Welfare*, *supra*] did not require an express statutory waiver of the state's immunity . . . the Court was careful to emphasize that it was concerned only with expenses incurred in litigation seeking *prospective relief* while the other cases involved retroactive liability for prelitigation conduct.

Id. at 344 n.16 (emphasis added).[12]

The Court below simply ignored these limitations on the *Hutto* rule by imposing fee liability in a very different category of cases—those involving the unauthorized torts of individual state officials, where damages are the only relief sought. If, instead, the Sixth Circuit had applied the correct standard, and sought an explicit mandate in section 1988 for a fee award against the state in this case, its ruling would necessarily have gone the other way. As we have discussed, there is no basis for con-

[11] Respondent, Opp. to Cert. at 10-11, and the trial court, Pet. App. at 5a, cite *Hutto* for the proposition that attorneys fees, as an element of "costs," do not fall within the shield of the Eleventh Amendment where States are parties in litigation. But in view of the Court's exclusive focus on injunctive cases, this broad proposition is insupportable. In any event, one could not use a "costs" theory to impose fee awards on third parties—like the state here—which were not even involved in the underlying litigation.

[12] *See also Pennhurst*, *supra*, 104 S. Ct. at 907 (citing *Quern*).

cluding that section 1988 authorizes a fee award against a state in a case where the only defendant is a state employee held liable in his individual capacity. On the contrary, every factor arguing in favor of a fee award in *Hutto* argues against a fee award in the present case. Where a state is liable on the merits, there is a basis for imposing a fee award. The same is just not the case here. In sum, far from explicitly abrogating the Eleventh Amendment for cases like this one, Congress evidenced no intent whatever to do so.

III. IT WOULD BE INDEFENSIBLE AS A MATTER OF POLICY TO IMPOSE FEE AWARDS ON STATES IN CASES LIKE THIS ONE.

In the view of amici, a decision authorizing fees in the present circumstances would impose unreasonable burdens on states and other governmental entities, while at the same time leading to significant overcompensation of plaintiffs.

First, the decision below, by imposing fee liability on the state, implicitly held that all constitutional torts are wrongs committed by the government, which require redress in the *public* interest. Such a stance contrasts sharply with the recognition, by several other courts, that in damages suits the "private attorney general" rationale for fee-shifting is far less apt because the wrong at issue is likely to be one-time and "essentially private" in nature. *Zarcone v. Perry*, 581 F.2d 1039, 1044-45 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *see Buxton v. Patel*, 595 F.2d 1182, 1184-85 (9th Cir. 1979).[13] These courts call for selectivity in the imposition of a fee award from anyone in a damages case.

The Sixth Circuit, however, in its rush to equate every police brutality case with a prison-reform case like *Hutto*,

[13] At the same time, the availability of damages may in itself provide sufficient incentive for the bringing of such cases. *Zarcone*, *supra*, at 1044-45; *Buxton*, *supra*, at 1184-85.

left little room for any such selectivity. The result of such a stance may well be virtually automatic fee-shifting even in those damages cases that, in reality, are little more than glorified tort suits. Particularly in view of the recent explosion of cases brought under section 1983,[14] this is hardly a welcome prospect.

More importantly, by shifting the fee obligation to the state rather than the individual defendant, the court below created the potential for abuse of section 1988 through settlements. This potential results from what must be considered the most peculiar aspect of the decision below—the fact that the state is being asked to pay fees for a case in which it played no significant role. The danger is that many other cases will repeat the pattern of this one. Here, the individual defendants (the only ones left in the case after the state was dismissed) settled by agreeing to pay certain amounts in damages while receiving a waiver of any fee claim as against them. Under the ruling below, this left the state liable for all of the fees at issue.

As long as the Sixth Circuit's rule is in place, the same risk will be present in nearly every settlement, because of two facts. First, an individual defendant has no interest in whether the amount he agrees to pay is labelled "damages" or "fees." The plaintiff, however, knows that every dollar in the settlement labelled "fees" will reduce the amount potentially available later from the state. As a result, he will ask that all recoveries from individual defendants be labelled "damages." The defendant, who has no interest in the issue, has little incentive to disagree.[15]

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[14] *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring in the result).

[15] Under any view, of course, a losing individual defendant is liable for fees under section 1988. In order to win a waiver of this element of liability in a settlement, the defendant generally will be required to pay a premium in the form of damages exceeding the amount that fairly reflects the plaintiff's actual injury.

Later, when the plaintiff wins "commensurate" fees from the state, his total recovery is likely to be greater than it would ever have been if there had been a single defendant responsible for all damages and fees. Essentially, there will be a double recovery of fees—once hidden in the amount paid in the settlement with the individual defendant, and once in the open in the order against the state.[16]

Obviously, it is very unfair to leave states potentially exposed to such excessive awards after the settlement of cases in which they play no role whatsoever. The only solution is to leave the responsibility for damages *and* fees where Congress intended it to be—with the individual defendant. States may choose to reimburse their employees in such cases, either routinely or on a case-by-case basis, but it would be intolerable to leave them with an open-ended obligation to pay the fees incurred in every constitutional damages suit between an employee and a citizen.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

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February, 1985

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[16] Indeed, because the "hidden" fee element in the damages settlement will magnify the plaintiff's apparent recovery "on the merits," the amount of fees paid *by the state alone* may well exceed what would be justified by the actual strength of the plaintiff's case. *Cf. Hensley v. Eckerhart*, —— U.S. ——, 103 S. Ct. 1933 (1983) (fee award should reflect degree of plaintiff's success on the merits).

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No. 84-849

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-849

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES MCCLAIN, FAYE MANION, SHELBY MANION, ROSE ELLA MCCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE and HOLLIS L. SEARCY - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

RESPONDENTS' STATEMENT OF THE FACTS

As the District Court found, this is a unique case upon its facts. On the evening of November 7, 1979, Clyde Daniel Graham became a suspect in the killing of State Trooper, Eddie Harris.[1] Immediately thereafter, the most intensive manhunt in the recent history of the Commonwealth of Kentucky ensued. It was

[1]Almost a month to the day thereafter, Clyde Daniel Graham was shot and killed by a Kentucky State Trooper at a motel in Effingham, Illinois. Clyde's death was the subject of a separate 1983 action filed in the United States District Court and was settled on the third day of trial.

during the course of this manhunt that the constitutional violations inflicted upon the Respondents occurred.[2]

There are at least two extraordinary aspects of this case. First, it can be accurately said that a substantial number of Kentucky State Police Troopers turned from their constitutional role as peace officers into an unruly, uncontrolled mob. The second and most extraordinary feature of all, however, was the direct personal presence and involvement of State Police Commissioner, Kenneth Brandenburgh, a policy making official, who was the highest ranking state law enforcement officer of the Commonwealth of Kentucky.[3]

It should be noted that the Petitioner adopts an intentionally ambiguous posture in regard to the involvement of Commissioner Brandenburgh. They have suggested, at various times and places, that Commissioner Brandenburgh was not present and not directly involved. On the other hand, at page 7 of its Statement of the Case, even the Petitioner concedes that Brandenburgh and his men were guilty of the use

[2]The evidence is overwhelming that the Respondents were subjected to two illegal searches, excessive force which required hospitalization, invasion of privacy, malicious prosecution and abuse of process.

[3]KRS 16.080, enacted by the legislature of Kentucky in 1976, provides in part as follows:

> "The Commissioner shall adopt, formulate, alter and repeal rules and regulations for the enlistment, training, discipline and conduct of officers of the bureau, and he may make any other rules and regulations for the governing and operation of the bureau as appear to him reasonably necessary to carry out the provisions of KRS 16.010 to 16.170."

of "excessive force" and "the officers acted in an unprofessional manner."

Any doubt of this concession by the Petitioner is removed by the following language set out at page 7 of its brief,

> "As a consequence of the failure of these officers to observe state policy, the Commonwealth of Kentucky has never supported either the Kentucky State Police Troopers, who were named individually or Kenneth Brandenburgh in any manner . . . . The Commonwealth of Kentucky has not contributed to nor paid the costs of litigation for any of the troopers or for the Commissioner."[4]

So great was the public outcry concerning the conduct of Commissioner Brandenburgh and his men that eventually Brandenburgh was replaced and the Attorney General of Kentucky was directed by the Governor to conduct an independent investigation surrounding the November 7, 1979 beatings and the subsequent death of Clyde Daniel Graham. The conclusions of the Attorney General's investigation are referred to, in part, by the Petitioner. (See Pet. App. pp. 27a-28a). Those conclusions are as follows:

A. A lack of leadership which resulted in an excessive number of troopers at the Graham residence to participate in the search, which rapidly became uncontrolled."

[4]Commissioner Brandenburgh's actions or inactions "may fairly be said to represent official policy." *Monell* v. *New York City Department of Social Services*, 436 U. S. 658, 56 L. Ed 2d. 611, 98 S. Ct. 2018 (1978).

B. The use of excessive force against the Plaintiffs.

C. An "obvious lack of professionalism . . . and a complete breakdown of the discipline demanded."

The Petitioner omitted any reference to the following additional conclusions of the Attorney General (the complete conclusions are set out in Res. App. p. 21).[5]

A. The failure to institute an immediate internal investigation into the allegations of the use of excessive force was erroneous and contributed to the failure to resolve these allegations.

B. The existing procedures for investigating complaints against members of the Kentucky State Police were totally inadequate.

C. The investigation directed by Commissioner Brandenburgh was cursory and incomplete.

The District Court also found Brandenburgh was directly involved in the constitutional violations:

> "In the case at bar, it was the action of the highest ranking police officer of the Commonwealth coupled with the action of many officers of the Commonwealth . . . which brought about the violations of the Plaintiffs alleged in this lawsuit, and which resulted in the settlement . . . . He (Police Commissioner Brandenburgh) is obligated to pay the sum of $45,000.00 as the result of his actions which along with those of other defendants led to this lawsuit (See Pet. App. pp. 6a-7a).

[5]These conclusions, were admissible as evidence in the United States District Court proceedings pursuant to F. R. Evid. 803 (8).

As a result of the large number of troopers and state police officials involved or potentially involved, the Respondents were required to engage in exhaustive discovery procedures. Upon completion of discovery, the action was assigned for trial and a settlement was obtained by the Respondents on the second day. As a part of the settlement, the Respondents specifically reserved the right to petition for an award of attorney's fees against the Commonwealth of Kentucky.

It is difficult to follow the ambiguous narrative by the Petitioner on the question of attorney's fees. At page 7 of their Petition for Writ of Certiorari, they claim that the attorney's fee Order was entered ex-parte. In their brief on the merits at page 10, they claim the United States District awarded fees without holding a hearing. In both petitions, they assert that the Commonwealth "had no notice prior to the signing of this Order that attorney's fees were being sought."

The record demonstrates the Commonwealth had ample notice. First of all, the Plaintiffs' Complaint in paragraph 4(d) alleges (J.A. p. 4),

> "Pursuant to the provisions of 42 U.S.C. §1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney's fees incurred in this action."

Secondly, the Commonwealth of Kentucky actively participated in the action as a named defendant until the United States District Court dismissed it by interlocutory order dated November 26, 1980 (Pet. App. p. 14a).

Finally, page 23 of the Joint Appendix reveals that the Respondents gave notice to the Petitioner of their request for attorney's fees on July 13, 1982, and that the Commonwealth responded to this Motion on August 10, 1982. It was not until September 2, 1982, (Pet. App. p. 18a) that Judge Allen entered the Order granting the Respondents attorney's fees assessible against the Commonwealth, and assigned the matter for a hearing on the amount of attorney's fees.

The final Order setting out the amount of attorney's fees was not entered until after a full evidentiary hearing at which all of the parties were represented, granted leave to call witnesses, to cross examine adverse witnesses and to introduce such evidence as the parties considered appropriate.

Thereafter, in the exercise of its discretion, the District Court entered an attorney's fee award in favor of the Respondents to be paid by the Commonwealth of Kentucky. The painstaking care with which the District Court drafted its Findings of Fact, Conclusions of Law and Memorandum Opinion is clearly evident from the record (Pet. App. p. 3a). There is no issue raised as to the dollar amount of the fee award.

SUMMARY OF THE ARGUMENT

1. The 11th Amendment is not and never has been a bar to an award of attorney's fees and court costs assessible against a state when prevailing plaintiffs vindicate federally protected constitutional rights by obtaining either money damages or prospective relief against policy making state officials. The 11th

Amendment only precludes an award of retroactive damages against a sovereign state and attorney's fees are not damages.

2. Respondents and not the Petitioner were prevailing parties against the Commonwealth of Kentucky by obtaining a damage settlement against State Police Commissioner, Kenneth Brandenburgh, in his official capacity. The acts of Commissioner Brandenburgh represented state policy by virtue of his office and subjected Kentucky to an assessment of fees under 42 USC §1988. That the Commonwealth was dismissed by interlocutory order by the United States District Court does not render it a prevailing party because states may be ordered to pay attorney's fees as a result of the acts of its policy making officials, whether named as a party or not.

3. The intent of Congress in enacting 42 USC §1988 was to encourage the vindication of federally protected constitutional rights and to authorize attorney's fee awards assessible against the states in any action whether at law or equity. This Court should not thwart such broad congressional intent by reversing the holding below.

ARGUMENT

I. While the 11th Amendment Precludes an Award of Damages on the Merits Against a Sovereign State, by Enacting 42 USC §1988, Congress Removed the 11th Amendment as a Bar to an Award of Attorney's Fees and Court Costs Assessable Against a State in Cases Such as This One, in Which Prevailing Plaintiffs Vindicate Federally Protected Constitutional Rights by Obtaining Either Money Damages or Prospective Relief Against Policy Making State Officials.

The Petitioner's reliance upon the 11th Amendment as a bar to the award of attorney's fees assessable against a state is misplaced. This Court squarely addressed this issue in *Hutto* v. *Finney,* 437 U. S. 694 (1978),

> "As this Court made clear in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws."
>
> "HR Rep. No. 94-1558, p. 7 (1976). The Report adds in a footnote that: 'Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments'."
>
> "Costs have traditionally been awarded without regard for the States' 11th Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court."

> "In *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70, 72 L. Ed. 168, 48 S. Ct. 97, the state challenged this Court's award of costs, but we squarely rejected the State's claim of immunity."

Although, injunctive relief and not retroactive damages were sought in *Hutto,* the Supreme Court of the United States in that decision did not limit the abrogation of 11th Amendment immunity to cases of prospective relief only. In *Maher* v. *Gagne,* 448 U. S. 122, (1980), this Court reaffirmed the broad intent of Congress to remove the 11th Amendment as a bar against fee awards payable by the states.

> "In *Hutto,* we rejected the argument of the Attorney General in Arkansas that the general language of §1988 was insufficient to overcome a State's claim of immunity under the Eleventh Amendment, noting that 'the Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants . . . .'"
>
> "Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a State. (sic) Congress was clearly acting within its power under §5 of the Fourteenth Amendment in removing that barrier. Under §5, Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claim falls within the category of 'appropriate' legislation. And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided . . . ."

> "As the Court of Appeals pointed out such a fee award 'furthers the Congressional goal of encouraging suits to *vindicate constitutional rights* . . . .'"
>
> "It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment." (emphasis added)

When *Hutto, supra* and *Maher, supra,* are considered side by side, certain principles emerge:

1. The Eleventh Amendment has never been a bar to the award of attorney's fees as costs payable by the states.

2. Even if the 11th Amendment were a bar to the award of attorney's fees against a state, that bar was destroyed by Congress when it enacted 42 USC §1988.

The Petitioner argues at page 17 of its brief that §1988 is extremely limited in its application. This Court is urged to declare that Congress only intended the award of attorney's fees against the states if prevailing plaintiffs were successful in obtaining *prospective* relief against policy making state officials.

This argument flies in the very teeth of the wording of the Act itself. The Act declares its application "in any action at law, suit in equity, or other proper proceeding for redress". §1988 does not provide a limited application to cases involving prospective relief. It broadly applies "in *any* action." Moreover, *Maher, supra,* at page 129 goes so far as to hold:

> "For purposes of the award of counsel fees, parties may be considered to have prevailed when

> they vindicate rights through a consent judgment or without formally obtaining relief."

Thus, even settlements without formal court orders qualify prevailing parties for fee awards under §1988 so long as constitutional rights are vindicated. It therefore seems self-evident that only one threshold or condition precedent exists for the award of attorney's fees. This condition precedent is simply that the plaintiff must vindicate federally protected constitutional rights.

It seems equally obvious that Congress intended the victims of constitutional violations to have at their disposal a full arsenal of legal remedies so that regardless of the form of the infringement, redress could be obtained. It can scarcely be debated:

> "In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974).

Similarly, in *Milwee* v. *Cavuoto,* 653 F. 2d 80 (2nd Cir. 1981), it was observed:

> "Moreover, an individual damage action to redress instances of police misconduct is often the only tool reasonably available to vindicate society's interest in insuring that those who enforce the law abide by it. (See authorities cited).
>
> "Certainly, the vindication of an individual's civil rights, in an action against a state trooper, inures to the benefit of all citizens."

In *Rheuark* v. *Shaw,* 447 F. Supp. 897 (1979), the Plaintiffs obtained damages against a state judge and his court reporter because of an unreasonable delay in the preparation of a trial transcript in which the Plaintiffs were earlier convicted of various criminal offenses. All injunctive relief was denied. In approving the award of attorney's fees, the Court held:

> "By enacting 42 USC §1988, Congress intended to override the 11th Amendment immunity of the states and authorize fee awards payable by the states when their officials were sued in their official capacity."

In *Raney* v. *Jackson State College,* 551 F. 2d 672 (1977), the Plaintiff obtained neither injunctive relief nor money damages. His entire recovery was limited to a declaratory judgment that his First Amendment right of free speech had been denied by the officers and members of the Board of Trustees of the Institution of Higher Learning of Mississippi. Nonetheless, the Court approved the award of attorney's fees in favor of the Plaintiffs and against the State of Mississippi.

In most brutality cases, injunctive relief would be totally inappropriate. A classic example of this premise is presented by the case at bar. All of the injunctive relief in the world would not serve to vindicate the constitutional rights of the Respondents, who were subjected to the treatment set out in the facts of this case. Exactly the same can be said of the constitutional violations which occurred in *Brandon* v. *Holt,* 469 U. S. ____ (1985), a police brutality case in which

this Court recognized the applicability of 42 USC §1983.

II. For Purposes of Obtaining the Award of Attorney's Fees Pursuant to 42 U.S.C. §1988, the Plaintiffs Were Prevailing Parties Against the Commonwealth of Kentucky by Their Recovery of Money Damages Against the Commissioner of Kentucky State Police, an Official Whose Acts May Be Fairly Said to Represent State Policy.

At the outset, we freely acknowledge that the Commonwealth of Kentucky was named as a party defendant in the original Complaint. This course was followed not because of a lack of awareness of the 11th Amendment or of the Doctrine of Sovereign Immunity. We reasoned as follows:

1. By including the Commonwealth as a named party and serving them with Summons, all doubt was removed as to whether the Commonwealth had notice of the claim for attorney's fees being asserted by the Respondents.

2. Counsel for the Respondents were acutely aware of the oft repeated language declaring that a state could be answerable to prevailing plaintiffs for an assessment of attorney's fees and costs "whether or not the state was named as a party." This language suggested that an alternative existed.

3. Counsel for the Respondents were aware of the concurring opinion in *Hutto supra,* suggesting the possibility that the 11th Amendment proscription against naming states as defendants was in doubt.

It was thus concluded to make a record in the event it became appropriate to address the issue on appeal.[6]

Having stated the reasoning of counsel in naming the state as a party defendant we wish to address the Petitioner's contention that since the state was dismissed under these circumstances, it became a prevailing party against the Respondents. This argument ignores three fundamental and undisputed facts.

First, the Respondents never sought the recovery of retroactive damages on the merits from the Commonwealth. Paragraph 4(D)(J.A. p. 4) states the sole basis for including the Commonwealth as a named party:

> "Pursuant to the provisions of 42 USC Sec. 1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney's fees incurred in this action."

Since the Respondents did not even seek money damages against the Commonwealth, it is obvious that the Commonwealth was not a prevailing party on the merits.

Second, it is obvious from the record that as to the only issue even pursued against the Commonwealth, i.e., the award of attorney's fees, the Respondents have succeeded.

Finally, the Petitioner overlooks the fact that the Commonwealth's liability for attorney's fees is not in

[6]Despite the foregoing, we do not take issue with the ruling of the District Court in entering its interlocutory order dismissing the Commonwealth as a named party. The voluntary settlement reached in this case eliminated any necessity for an appeal.

any way dependent upon whether or not they are named as a party. The Commonwealth's liability for attorney's fees arises from the fact that the Respondents sued a policy making official "in his official capacity" and prevailed by settlement.

In *Monell* v. *New York City Department of Social Services,* 436 U. S. at pp. 658, 690 N 55 (1978), this Court held that for purposes of evaluating the liability of New York City under §1983, the actions of the City's Department of Social Services were considered the actions of the City itself. That New York was not expressly named as a Defendant, did not prevent the action from being treated as one against the City.

In *Hutto, supra,* the State of Arkansas was not named as a Defendant. This Court nonetheless recognized that the State was subjected to payment of the fee award because the state officials had been sued in their official capacity.

Although, *Monell* and *Hutto* involved successful claims for prospective relief only, this Court has recognized that even damage suits against policy making governmental officials are tantamount to suits against the governmental entity whom the official represents. As recent as January 21, 1985, in *Brandon* v. *Holt, supra,* it was held,

> "In at least three recent cases under §1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents . . . . We now make that point explicit."

It thus can be seen that although the 11th Amendment shields a sovereign state from liability for money damages on the merits, the 11th Amendment has no application insofar as §1988 is concerned. Neither the Petitioner nor the Amici have submitted any legal authority to the contrary.

III. This Court Should not Thwart the Broad Remedial Intent of Congress to Encourage the Vindication of Constitutionally Protected Rights by Unduly Restricting the Application of 42 USC §1988 as Urged by the Petitioner.

Amici contend that because of the recent explosion of §1983 actions, this Court should relieve the states of any responsibility for the payment of attorney's fees and instead impose this responsibility upon individual defendants. It is intolerable, they claim, to place an "open-ended obligation upon the states to pay fees incurred in every constitutional damage suit between an employee and citizens." They even raise the grim specter of over compensation.[7]

[7]The claim of over compensation in this case for either the Respondents or their counsel is almost laughable. The ink had hardly dried on the Complaint when an indictment was returned against Buddy Graham in the United States District Court charging him with the offense of harboring his deceased son, Clyde. This resulted in a week's trial which had the effect of exhausting the limited resources of the Graham family.

Following the beatings on November 7, 1979, and almost as an afterthought, the Kentucky State Police charged the male Respondents with the offenses of disorderly conduct and resisting arrest. No effort was made to bring these charges to trial until after the §1983 action was filed. This criminal prosecution also resulted in a week's trial and numerous appeals thereafter. The

(Footnote continued on following page)

The claim that this case will expose state treasuries to plunder in every constitutional damage suit between an employee and citizens is patently ridiculous and ignores the unique nature of the case at bar.

If indeed, it is desirable to "curtail the explosion of §1983 cases", this action by any standard, is not equal to the task. This is a narrow case, severely limited in its possible application. The Commonwealth of Kentucky is liable for attorney's fees in this case because of the constitutional violations committed by its Commissioner of State Police and only then because the Commissioner of State Police in Kentucky is vested with unique policy making authority by the Kentucky State Legislature.

The state remains totally shielded from attorney's fee exposure in the vast majority of cases in which constitutional violations are committed by the rank and file of state employees.

Amici rely upon *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U. S. 719 (1980) and *Pulliam* v. *Allen,* ___ U. S. ___, 80 L. Ed

(Footnote continued from preceding page)

special prosecutor in this criminal action then brought a wrongful death civil damage suit against the Estate of Clyde Daniel Graham and subsequently amended the Complaint to interplead Buddy Graham as a defendant. Although the Complaint did not allege agency between Buddy and his son Clyde, did not allege that Buddy commanded the killing of Trooper Harris or knew of it, or could have prevented it, or profited from it in any way, the Amended Complaint withstood all motions to dismiss and also resulted in a week's trial. No part of the attorney's fees in the case at bar are as a result of any of the foregoing litigation. In any event no issue is raised in the case at bar that the attorney's fee is excessive.

2d 565, 104 S. Ct. ____ (1984) as authority for the proposition that liability for fees must depend upon merits liability.

In both cases relied upon by Amici, this Court was presented with significantly different facts than are presented by the case at bar. There, the Court was confronted with the peculiar problems raised by legislative and judicial immunity. Here the sole question to be decided upon is whether a *state* can be ordered to pay the legal fees incurred by a prevailing §1983 plaintiff. In *Hutto,* Footnote 31 at page 669, this Court confirmed that states were intended by Congress to be subject to attorney's fees awards:

> "The present Act, in contrast, has a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards. Moreover, the Act is not part of an intricate regulatory scheme offering alternative methods of obtaining relief. If the Act does not impose liability for attorney's fees on the States, it has no meaning with respect to them."

The intent of Congress in enacting §1988 was to encourage the vindication of constitutional rights. Should this Court sustain the position of the Petitioner, a small but nonetheless important class of constitutional infringements would be effectively removed from the possibility of vindication.

It has been our experience that the vast majority of potential victims of police brutality are the poor and the underprivileged. Without the incentive of attorney's fee awards assessible against a financially responsible entity, many constitutional infringements will not be vindicated. We cannot believe Congress intended such a result.

CONCLUSION

If the Commonwealth of Kentucky is permitted to escape attorney's fee responsibility by the simple act of disavowing, after the fact, the actions of its own policy making State Police Commissioner, §1988 will be effectively destroyed in cases such as this one. Every state when faced with a factual situation remotely similar to the case at bar will be given a green light to thwart the objective of §1988 by simply firing or disavowing the policy making official involved.

In our view, the incentive of the states to monitor and supervise so as to avoid constitutional infringements will, at the very least, be greatly weakened.

For all of the foregoing reasons, we respectfully submit that the judgments of the United States District Court and the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONCLUSIONS

After reviewing all of the information obtained during the investigation into the murder of Kentucky State Police Trooper Eddie Harris and the subsequent shooting death of Clyde Daniel Graham by Kentucky State Police Sgt. Eugene Coffey in Effingham, Illinois, the Office of the Attorney General concludes the following:

1. *The Death of Kentucky State Police Trooper Eddie Harris*

All of the available evidence overwhelmingly indicates that Clyde Daniel Graham shot and killed Kentucky State Police Trooper Eddie Harris without provocation.

2. *The November 7-8, 1979 Search of the Graham Residence by Law Enforcement Authorities*

a. The requisite leadership by the Elizabethtown Kentucky State Police command staff, from the post commander down, was lacking on the night of November 7, 1979. This lack of leadership resulted in confusion by state police personnel as to assignments and in the convergence of an excessive number of troopers at the Graham residence to participate in a search which rapidly became uncontrolled.

b. The evidence indicates that certain Kentucky State Police personnel used excessive force against James D. "Jimmy" Graham during the search of the Graham residence on the night of November 7, 1979.

It is noted that conflicting testimony concerning the use of excessive force in the arrest of James E. "Buddy" Graham, Charles McLain and James D. Graham on the night of November 7, 1979, at the Graham residence has been considered by two juries, one in the United States District Court in Louisville, Kentucky, during the trial of James

E. "Buddy" Graham on charges of harboring a fugitive, etc. and one in the trial of these three individuals in Hardin District Court on the charges of disorderly conduct and resisting arrest. The jury in the federal case acquitted James E. "Buddy" Graham on all charges, while the jury in the state case convicted James E. "Buddy" Graham and Charles McLain of disorderly conduct and resisting arrest, while acquitting James D. Graham of all charges. It is further noted that the law allows a defendant, when said defendant believes that such force is necessary to protect himself, to use physical force if the arresting officer is using more force than is reasonably necessary to effect the arrest. (See KRS 503.050(1); KRS 503.060(1) and Commentary).

Therefore, while there is some question raised as to whether excessive force was used in the arrest of James E. "Buddy" Graham and Charles McLain, there seemed to be no question in the mind of either jury concerning the use of excessive force in the arrest of James D. "Jimmy" Graham. No one interviewed admitted striking any of these individuals, other than the one blow struck by Trooper Harold Antle to Charles McLain, and no one interviewed identified anyone as striking any other blows.

c. The above actions by both the post command staff and certain individual state troopers demonstrated an obvious lack of professionalism on their part and a complete breakdown of the discipline demanded of such highly trained law enforcement officials. While the existence at that time of a highly charged, emotional atmosphere among members of the Kentucky State Police is certainly understandable because of the gruesome murder of their comrade, Trooper Eddie Harris, and their knowledge of the past criminal activities of some of the individuals involved, this cannot justify the unprofessional actions referred to above. Therefore, this report is being forwarded to the Secretary

of the Kentucky Department of Justice and the Commissioner of the Kentucky State Police for whatever action they deem appropriate to insure that such actions will not recur.

3. *The Death of Clyde Daniel Graham in Effingham, Illinois*

a. While questions can be raised concerning the appropriateness of the plan to effect the apprehension and arrest of Clyde Daniel Graham which was devised by Illinois and Kentucky officers on the night of December 7, 1979, this office cannot conclude that such a plan was an unreasonable one, when viewed from the standpoint of the circumstances involved at that time.

Certainly, hindsight tells us that there must have been a better way. However, at the time such plan was devised, the officers involved did not have the benefit of knowing what would happen. Public streets ran both in front of and in back of the Villa Inn Motel, and public safety had to be considered. At the same time, one can certainly perceive of plans to surround the room and call upon the suspect to come out or to use teargas and bullet-proof vests which had been called for.

While this office has its own doubts about the advisability of the decision which was made, in the end it was a judgment call to be made by those at the scene after considering all of the alternatives.

b. Nothing approaching a struggle occurred between Sgt. Eugene Coffey and Clyde Daniel Graham at the doorway to Room 7 of the Villa Inn Motel in Effingham, Illinois, immediately preceding the shooting of Clyde Daniel Graham; and Sgt. Coffey fired the shots that killed Clyde Daniel Graham before entering the room. None of the eyewitnesses to the event saw any struggle take place. Several witnesses testified that both shots were fired by Sgt. Coffey from outside of the room. Even Sgt. Coffey

indicated that he never really struggled with Graham, but "just barely got my hands on him and he backed away and continued reaching for his rear pocket". Whether Graham was indeed reaching for his rear pocket and whether Sgt Coffey was indeed in fear of his life are questions which apparently will never be answered.

c. There exists conflicting testimony as to what Kentucky State Police had been told and what they believed concerning whether Clyde Daniel Graham was heavily armed or not. We were unable to resolve these conflicts.

d. Sgt. Eugene Coffey shot Clyde Daniel Graham once in the front of the body and once in the back of the body. These shots occurred rapidly with little time lapse between them. This office concurs with the opinion of Dr. Frank Cleveland that in all likelihood, tthe first shot fired hit Clyde Daniel Graham in the front of the body at an angle as the body was beginning to turn and the scond shot entered the back of the body as Clyde Daniel Graham was falling forward away from the door. The short amount of time between the two shots, the fact that both shots were fired from outside the room and from approximately the same distance from the body and the angles of entrance and exit wounds all support such a conclusion as opposed to the possibility that the first shot entered the back of the body. (See Dr. Cleveland's Statement.)

While this conclusion does not necessarily rule out the possibility that Sgt. Coffey feared for his life when he fired these two shots, it certainly is in direct contradiction of his statement that he fired a shot into the front of Clyde Graham which did not knock him down and then fired another shot into the front of Graham, this time knocking Graham down.

4. *Procedures of Illinois Officials following the Death of Clyde Daniel Graham*

a. Some evidence at the scene of the shooting of Clyde Daniel Graham was not properly secured and maintained by Illinois authorities, to wit: The body was moved and the shirt the decedent was wearing at the time of the shooting disappeared.

b. The fact that Clyde Daniel Graham was shot once in the back of the body was so obvious that we must conclude that such fact was either deliberately concealed or not discovered as a result of gross incompetence by certain Illinois officials and by at least one Kentucky State Trooper.

Undoubtedly, Sgt. Coffey knew that one of the shots entered the back of Clyde Daniel Graham. In addition, it is the opinion of this office that Dr. Ernest G. Frank, the Effingham, Illinois pathologist who performed the post-mortem examination of Clyde Daniel Graham and Dr. R. R. Lystilla, then Coroner of Effingham, Illinois, who attended most of the examination, knew or should have known this fact at the time of said examination. Dr. Cleveland and Dr. Hamilton confirmed as much in their reports.

Furthermore, it is the opinion of this office that anyone who viewed the body of Clyde Daniel Graham either at the scene or later in any detail probably knew that one shot had entered the back of Clyde Daniel Graham. Even when an untrained eye views the pictures of the front and the back of the body, it is extremely difficult to reach any other conclusion.

As a result of the aforementioned conclusions, copies of this report are being forwarded to the Governor and the Attorney General of the State of Illinois, the Superintendent of the Illinois State Police, the Illinois Board of Medical Licensure, and the Kentucky Secretary of Justice for their review and consideration.

6. *Kentucky State Police Investigation*

a. An internal investigation into allegations of the use of excessive force by certain Kentucky State Troopers during the arrests of the three individuals on the night of November 7, 1979, should have been instituted immediately. Although such allegations came to light very shortly after the arrests, the decision was made to delay any review of these allegations until after certain civil rights complaints had been resolved by the federal government. Had such an internal investigation begun immediately, perhaps more definite answers could have been found concerning the events of the night of November 7, 1979.

It is our recommendation that it be mandatory procedure to immediately conduct investigations of allegations of misconduct by Kentucky State Police personnel whether formal complaints have been filed with the Kentucky State Police or any other agency.

b. The procedures for investigating complaints against Kentucky State Troopers which existed on November 7, 1979, were totally inadequate. It is the opinion of this office that the existence of a completely separate internal unit or a unit outside of the Kentucky State Police is imperative in order to investigate such complaints to the satisfaction of both complainants and the general public.

c. The investigation of this whole series of events by Lt. Larry Fentress under the direction of then Commissioner Kenneth Brandenburgh was cursory and incomplete, and points up the inherent problem of agency personnel investigating their own agency. However, based on our investigation, we conclude that neither former Commissioner Brandenburgh nor Lt. Fentress knew that Clyde Daniel Graham was shot once in the back until being shown the pictures indicating such by the staff of this office during our interviews with them.

CERTIFICATE OF SERVICE

I, Jack M. Lowery, Jr., Counsel for Respondents, hereby certify that the foregoing Brief for Respondents was served on Petitioner by depositing three copies of same in the United States mail, first class postage prepaid, this 27 day of March, 1985, addressed to:

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